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2533

No. 11937

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O. ENGLAND, Trustee of the Estate of
Burlingame Products Co., Inc., Bankrupt,
Appellant,

vs.

F. W. MacKAY,

Appellee.


Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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PAUL P. O'BRIEN,
CLERK



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit in Response to Order to Show Cause..	10
Appellant's Statement of Points to Be Urged Upon Appeal	29
Certificate of Clerk to Transcript of Record on Appeal	34
Designation of Record on Appeal.....	31
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals..	27
Order Approving Trustee's Bond.....	3
Order Extending Time to Docket.....	28, 33
Order of Adjudication and Reference.....	2
Order on Petition for Review of Referee's Order	23
Order on Petition that F. W. MacKay Turn Over Assets	15
Order to Show Cause.....	8
Petition for Order to Show Cause.....	4
Petition for Review of Order of the Referee Herein	19

Reporter's Transcript	35
Order to Show Cause vs. F. W. MacKay..	88
Witnesses for Trustee:	
MacKay, F. W.....	65
—recalled	78
MacNeil, Alfred J.....	36
Mauborgne, Joseph O.....	48
—recalled	82
Response to Order to Show Cause by F. W. McKay	9

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District Court of the United States for the
Northern District of California, Southern
Division

No. 36674 R In Bankruptcy

In the Matter of

BURLINGAME PRODUCTS CO., INC.,
Bankrupt.

ORDER OF
ADJUDICATION AND REFERENCE, ETC.

At San Francisco, in said District, on the 24th
day of February, 1947.

The Petition of E. G. Stephens, doing business as Western Steel & Wire Co., Alfredo De Nola, doing business as Universal Container Co. and San Francisco Wire & Iron Works, a copartnership, filed on the 22nd day of January, 1947, that Burlingame Products Co., Inc., be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Burlingame Products Co., Inc., is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Burlingame Products Co., Inc., shall hence-

forth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in Burlingame "Advance-Star", a newspaper published in the County of San Mateo, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated February 24, 1947.

MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed Feb. 24, 1947. [1*]

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At a Court of Bankruptcy, held in and for the Northern District of California, Southern Division, at San Francisco, the 17th day of April, 1947, before Burton J. Wyman, Referee in Bankruptcy in the Southern Division of the United States District Court for the Northern District of California.

It appearing to the Court that John O. England of the City and County of San Francisco, in said

*Page numbering appearing at foot of page of original certified Transcript of Record.

District, has been duly appointed Trustee of the estate of the bankrupt above-named, and has given a bond with sureties for the faithful performance of his duties, in the amount fixed by the Court, to-wit: in the sum of Four Thousand (\$4,000.00) Dollars.

It Is Ordered that the said bond be, and the same is hereby approved.

Dated, this 22nd day of April, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

I hereby certify that the foregoing is a full, true and correct copy of the original on file in my office.

Dated 2/22/47.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 25, 1947. [2]

[Title of District Court and Cause.]

PETITION FOR
ORDER TO SHOW CAUSE

To the Honorable Burton J. Wyman, Referee in
Bankruptcy of the above-entitled Court at San
Francisco, in said District:

The petition of John O. England, Trustee in
Bankruptcy of the estate of Burlingame Products

Co., Inc., a corporation, bankrupt, respectfully shows:

1. That on the 24th day of February, 1947, by the consideration of the United States District Court for the Northern District of California, said Burlingame Products Co., Inc., a corporation, was duly adjudged bankrupt upon a petition filed against it whereupon administration of said estate was duly referred to Burton J. Wyman, Esq., Referee in Bankruptcy, before whom such proceedings were had as that thereafter, to wit, on the 17th day of April, 1947, your petitioner was duly appointed Trustee of the bankrupt's estate [3] and effects, thereupon qualifying as such, and your petitioner has ever since has been and now is the duly qualified and acting trustee of said estate in bankruptcy.

2. That your petitioner has heretofore caused to be examined in this proceeding under Section 21-A of the Bankruptcy Act, J. Mauborgne, President of said bankrupt corporation, A. A. MacNeil, Secretary-Treasurer thereof, and F. W. MacKay; that from such examination and the testimony of said witnesses, it appears, and your petitioner so alleges the fact to be, that the bankrupt corporation was organized in March, 1946; that no permit to issue shares of capital stock has ever been obtained from the Corporation Commissioner of the State of California and that no shares of capital stock have ever been issued to any of the officers or directors of said corporation, or to anyone else; that said corporation

was organized at the instigation of said F. W. MacKay for his personal benefit and that the said F. W. MacKay and said corporation were and are in reality the same, and that said F. W. MacKay, with disregard of the substance or form of corporate management, has treated its affairs as his own and as a part of his own enterprise.

3. That the assets of this bankrupt estate are insufficient to satisfy the claims of creditors which have been filed in this proceeding.

4. That it is the contention of your petitioner that the said bankrupt corporation and the said F. W. MacKay are one and the same; that by reason thereof the said F. W. MacKay is responsible as an individual for the payment of the debts contracted in the name of the bankrupt corporation, and that his assets should be marshaled by this Court for the purpose of realizing therefrom sufficient moneys, with the moneys now in your petitioner's hands, to satisfy all of the claims of creditors filed herein.

Wherefore, your petitioner prays that an Order to show [4] cause be issued upon the said F. W. MacKay to appear and show cause, if any there be, why an Order should not be made and entered requiring said F. W. MacKay to turn over to your petitioner all of his assets, or to pay to your petitioner a sum of money sufficient, with the moneys now in your petitioner's hands as Trustee of this estate, to satisfy proper expenses of administration

herein and all of the creditors' claims filed in this proceeding.

JOHN O. ENGLAND,
Trustee in Bankruptcy.

JAMES M. CONNERS,

STANLEY M. McLEOD,
Attorneys for Trustee.

State of California,
City and County of San Francisco—ss.

John O. England, being duly sworn, does hereby make solemn oath and says:

That he has read the foregoing petition and that the same is true to the best of his knowledge and belief.

JOHN O. ENGLAND.

Subscribed and sworn to before me this 29th day of July, 1947.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 30, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [5]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the petition of the Trustee in the above-entitled proceeding, wherein the Trustee prays for an Order requiring F. W. MacKay to turn over to said Trustee all of his assets or to pay to said Trustee a sum of money sufficient, with the moneys now in said Trustee's hands, to satisfy all proper expenses of administration herein and all of the creditors' claims filed in this proceeding.

Now, upon motion of James M. Connors and Stanley M. McLeod, attorneys for the Trustee,

It Is Hereby Ordered that the said F. W. MacKay be, and he is hereby required to appear before the undersigned, Burton J. Wyman, Esq., Referee in Bankruptcy, at the courtroom of said Referee, Room 609, 1095 Market Street, San Francisco, California, [6] on the 8th day of September, 1947, at 2 o'clock in the afternoon, to show cause, if any he has, why such Order should not be granted.

It Is Further Ordered that service of a copy of the Trustee's Petition and this Order on the said F. W. MacKay on or before August 15th, 1947, shall be sufficient notice of the hearing of this Order.

Dated: July 30, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed July 30, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [7]

[Title of District Court and Cause.]

RESPONSE TO ORDER
TO SHOW CAUSE BY F. W. MacKAY

Now comes F. W. MacKay, by his attorney undersigned, in response to the Order to Show Cause issued in the above-entitled proceeding of date July 30th, 1947, and respectfully represents and shows:

I.

That the petition for said Order to Show Cause does not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever.

II.

By way of factual showing under the said Order, but without waiver of the foregoing objection to the competence of said petition, respondent attaches hereto his affidavit and refers to the same and makes it a part hereof.

Wherefore respondent prays that the said Order to Show Cause be discharged and dismissed forthwith.

Dated, San Francisco September 8, 1947.

NATHAN MORAN,

Attorney for F. W. MacKay.

Overruled, 9/8/47 in open court, B.J.W.

[Title of District Court and Cause.]

AFFIDAVIT IN RESPONSE
TO ORDER TO SHOW CAUSE

State of California,

City and County of San Francisco—ss.

F. W. MacKay being first duly sworn deposes and says:

That he is an American citizen, of the age of 53 years or thereabouts, and by profession a geologist and mining operator. That approximately sixteen years ago he retired from professional and general business activities and since that time has devoted himself to travel and the pursuit of outdoor recreation.

That affiant has no dependents nor any living near relatives. That he has from sources outside the State of California an income sufficient to supply his wants and that he has no motive nor incentive, nor any desire nor inclination to amass properties, to increase his income, nor to re-enter business activities of any kind, but that from time to time he has become acquainted with worthy individuals who were struggling to advance themselves under difficulties and has advanced them financial aid but

with no motive of profit to himself except to recover the amount of [9] such advances and possibly interest thereon at current commercial rates.

That during the war period affiant became acquainted in San Francisco with one Joseph O. Mauborgne Jr., through a common interest in breeds of dogs, and formed for him liking and regard; that said Mauborgne is in the business of running a pet shop and had knowledge of a small bird-cage manufacturing business operated by an individual who wanted to retire, and that he, Mauborgne, wished to acquire and operate the same as a side line to his store, more especially as there was a war shortage of the product, and to him affiant advanced the money required to purchase the machinery and equipment used in said business. Said transaction was made under an agreement between affiant and said Mauborgne that the latter should devote all necessary time in mechanical and managerial services to the operation of the said business, without salary or compensation other than that the profits thereof would be divided share and share alike between himself and affiant. That said purpose was made, and Mauborgne took over the equipment and operation of the said business accordingly, and continued the same in the said City of San Francisco under the trade name of Western Products Company. That bird-cages were and are important to said Mauborgne but of no interest or consequence to affiant.

That during the early part of the year 1916 affiant decided to return for an indefinite period to

the Island of Tahiti in the South Pacific, where he had resided and had interests previously to his coming by reason of the war to San Francisco, and he thereupon consulted an attorney with respect to his local business affairs, and was by the latter advised that the business last referred to did not have proper legal standing inasmuch as the fictitious name thereof had never been registered as required by law.

That upon consultation between affiant and said Mauborgne it was mutually agreed that they would form a corporation to take [10] over and operate the said business, on the basis that the profits and emoluments thereof of whatever the same might consist would be divided share and share alike between the two, and in pursuance of said agreement a corporation was formed, under the name Burlingame Products Company, which took over the assets and operation of the preceding business, and inasmuch as its facilities in San Francisco were inadequate moved the same to the City of Burlingame, County of San Mateo, California, in the course of which affiant made further cash advances to the said corporation, of which Mauborgne had become president and manager and who thereafter gave to it his full time and services and the use of his automobile without salary or compensation other than his agreed prospective one-half share in the profits and any issue of corporate stock which might result. That the said Mauborgne also from time to time made contributions in cash for

the benefit of the said corporation, the amount of which affiant does not at present recollect.

That affiant did not become a director or officer of the said corporation, and shortly after its formation departed for the Island of Tahiti, where he remained until in or about the month of September 1946 when he returned to San Francisco and found that the said corporation was in a state of insolvency.

That at the first meeting of the board of directors of said corporation its attorney was requested and instructed to make application to the Corporation Commissioner of the State of California for the issuance of corporate stock, in such amounts as in his opinion were justified by the financial condition of the company; that affiant is informed by said attorney and believes and therefore alleges that in the interim last mentioned no application was filed with the said Corporation Commissioner for the issuance of stock, for the reason that the removal of the corporate business from San Francisco and its reestablishment in Burlingame [11] involved numerous complications and distractions on the part of the company's officers and that the financial and other statements required by law and regulations for a proper application to the Corporation Commissioner could not be obtained.

That in addition to the instance hereinabove cited, on three other occasions this affiant has made financial advances to individuals whom he considered personally worthy, in order that they might individually better their condition in the community,

on an agreed basis of sharing in profits and emoluments, two of which were in the ratio of equal shares and the other at a somewhat different percentage.

Affiant expressly denies that the said corporation, Burlingame Products Company, was organized at his instigation or for his personal benefit or otherwise than as hereinabove alleged, and further denies that affiant and said corporation were and are or were or are in reality the same or otherwise than as hereinabove alleged—that affiant was to receive 50% of the profits and emoluments thereof; and further denies that affiant disregarded the substance or form, or either of them, of corporate management, and has treated its affairs as his own and as a part of his own enterprise, or any or either of them. Affiant further denies that the bankrupt corporation and he are one and the same or otherwise than as hereinabove alleged, and further denies that by any reason at all affiant is responsible as an individual for the payment of the debts contracted in the name of said bankrupt corporation and that his assets should be marshaled by this Court for the purpose of realizing therefrom sufficient monies or any monies to satisfy all or any of the claims of creditors filed in this proceeding; and denies generally and specifically that affiant is responsible as an individual or otherwise for the payment of any debts contracted in the name of said bankrupt corporation, or otherwise or at all.

F. W. MacKAY. [12]

State of California,
City and County of San Francisco—ss.

F. W. MacKay being first duly sworn deposes and says:

That he has read the foregoing Affidavit in Response to Order to Show Cause and that the same is true of his own knowledge except as to those matters alleged on information or belief, and that as to those matters he believes it to be true.

F. W. MacKAY.

Subscribed and Sworn to before me this 8th day of September, 1947.

Original Signed By

[Seal] NELL O'DAY,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 26, 1948.

[Endorsed]: Filed Sept. 8, 1947. Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [13]

[Title of District Court and Cause.]

ORDER ON PETITION THAT F. W. MacKAY
TURN OVER ASSETS

This matter came before the court on September 8, 1947, on the petition of John O. England that

F. W. MacKay turn over to said petitioner, as the trustee of the estate of the above-named bankrupt, all of said MacKay's assets, or a sum of money sufficient (when added to the proceeds of the bankrupt estate) to satisfy all legal expenses of administration herein and all of the creditors' claims filed in this proceeding, upon the order to show cause based on said petition; upon the response and affidavit of said MacKay, and (in accordance with a stipulation on the part of interested counsel) upon the evidence theretofore given in the above-entitled proceeding in bankruptcy, and the matter having been submitted for decision on briefs and the briefs having been filed and considered [14] by the court, in connection with the aforesaid evidence, the court, now being advised fully in the premises, finds that:

1. On February 24, 1947, Burlingame Products Co., Inc., a corporation, duly was adjudged a bankrupt by the above-entitled court, and the above-entitled matter duly referred to the undersigned referee in bankruptcy for further proceedings; on April 17, 1947, John O. England duly was appointed trustee of the bankrupt's estate and thereupon qualified as such trustee, and at the times of the filing of the aforesaid petition against F. W. MacKay, and all times since said last mentioned filing of said petition, has been, and now is, the duly appointed, qualified and acting trustee in bankruptcy herein;

2. In March, 1946, the above-named bankrupt became, ever since has been, and now is, a corpo-

ration organized and existing under the laws of the State of California, and, neither at the time it first became such corporation, nor at any time since, has any permit to issue shares of capital stock thereof ever been issued to the officers and/or directors of said corporation, or to any one else;

3. The corporation was organized at the instigation of F. W. MacKay and for the personal benefit of F. W. MacKay, and not otherwise, and said corporation now is, and at all times since its organization, in truth, has been F. W. MacKay who, as an individual, has disregarded the substance and/or form of said corporation and has treated the affairs of said corporation as his own and as a part of his own enterprise;

4. The assets of the bankrupt, as such alone, are insufficient to satisfy the bankrupt corporation's creditors' claims which, under the Bankruptcy Act, are, and/or will be, entitled to allowance in this bankruptcy proceeding;

5. All the debts contracted in the name of said corporation, in truth, were contracted by, in behalf of and/or for the ultimate benefit of F. W. MacKay, as an individual, and not otherwise, and said F. W. MacKay, as such individual, and said bankrupt are debtors, [15] and each one of them is a debtor, of the creditors who, of record herein now appear, or who later herein may appear as creditors only of said bankrupt having allowed and/or allowable claims in this bankruptcy proceeding;

6. The assets of said F. W. MacKay, or so much thereof as are necessary (when added to the assets

of the bankrupt) to pay all the legal expenses of administration herein and to satisfy all claims of creditors which now may be and/or which hereafter may be allowed in the above-entitled bankruptcy proceeding, are subject to be used for the purpose of paying the aforesaid expenses and creditors' claims in the proceeding in bankruptcy.

The court, therefore, concludes as a matter of law that:

The trustee in bankruptcy herein, upon the basis of the aforesaid petition and the facts in support thereof is entitled to have turned over to the estate of the bankrupt all assets of said F. W. MacKay, as an individual, or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the bankrupt's assets) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in the above-entitled bankruptcy proceeding.

Order

It Hereby Is Ordered, Adjudged and Decreed that F. W. MacKay, as an individual, forthwith turn over to John O. England, as the trustee in bankruptcy herein, all of said F. W. MacKay's assets, or at least so much thereof as, added to the assets of the estate of the above-named bankrupt, will be sufficient to pay all legal expenses of administration, and also to satisfy, in full, all creditors of the bankrupt whose claims are proved and

allowable in the above-entitled bankruptcy proceeding.

Dated September 26, 1947.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy. [16]

[Endorsed]: Filed Sept. 26, 1947, Burton J. Wyman, Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order Dated September 26, 1947, filed Nov. 19, 1947.) [17]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF
THE REFEREE HEREIN

Now comes F. W. MacKay by the undersigned his attorney, and deeming himself aggrieved by the order of the Referee appointed and acting in this proceeding a copy of which order is hereto annexed, petitions for review of such order by a judge of the above-entitled court, and respectfully represents and shows:

I.

That the order complained of is set forth in the form of Exhibit A hereto annexed and hereby referred to and made a part hereof.

II.

That petitioner alleges errors in respect to the said order as follows:

(1) That the Referee erred in holding that the Petition for Order to Show Cause filed herein by the trustee of the estate of the above-named bankrupt and whereon the said Order to Show Cause is founded states facts or grounds sufficient to support any proceeding against this petitioner or for the granting of any [18] relief against him; and further erred in refusing to dismiss the said petition for failure to state facts or grounds to support such petition.

(2) That the Referee erred in not dismissing for want of equity the said petition of the trustee filed herein.

(3) That the Referee erred in basing the order complained of in whole or in part on the ground that the bankrupt corporation neither at the time it first became a corporation nor at any time since has procured any permit to issue shares of capital stock and that no shares of stock have ever been issued to the officers and/or directors of said corporation or to anyone else.

(4) That the Referee erred in holding and finding that there was any instigation on the part of this petitioner in the formation of the said bankrupt corporation, and further erred in holding and finding that said corporation was formed for the personal benefit of petitioner herein and not otherwise; and further erred in holding and finding that said corporation now is and at all times since its organization or at any time at all has been F. W. MacKay, petitioner herein, and further erred in holding and finding that said petitioner as an in-

dividual has disregarded the substance and/or form of said corporation or either of them or has treated the affairs of said corporation as his own and as a part of his own enterprise, and in each and all of said particulars.

(5) That the Referee erred in holding and finding that all the debts contracted in the name of the said corporation were contracted by, in behalf of and/or for the ultimate benefit of said F. W. MacKay as an individual, petitioner herein, and in each and every particular of said findings, and further erred in holding and finding that said F. W. MacKay as an individual, petitioner herein, is a debtor of the creditors who of record herein now appear or who later herein may appear as creditors only of said bankrupt having allowed and/or allowable claims in this bankruptcy [19] proceeding or that petitioner herein is the debtor individually of any of said creditors present or prospective.

(6) That the Referee erred in holding and finding that the assets of petitioner herein or so much thereof as are necessary (when added to the assets of the bankrupt) or that any assets of petitioner whatsoever or at all are necessary to pay all the legal expenses of administration herein and to satisfy all claims of creditors which now may be and/or which may hereafter be allowed in the above-entitled bankruptcy proceeding, or that any assets whatsoever of petitioner herein are subject to be used for the purpose of paying the aforementioned expenses and creditors' claims in the proceeding in bankruptcy or any or either of them.

(7) That the Referee erred in concluding as a matter of law that the trustee in bankruptcy herein upon the basis of the aforesaid proceedings and the facts in support thereof or any or either of them or at all is entitled to have turned over to the estate of the bankrupt all assets of said petitioner as an individual or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the bankrupt's assets) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in the above-entitled bankruptcy proceeding, or that said trustee, upon any grounds whatsoever, is entitled to have turned over to the estate of the bankrupt any assets of petitioner herein as an individual or otherwise or at all.

(8) That the Referee erred in ordering, adjudging and decreeing that petitioner herein as an individual forthwith or at any time at all turn over to John O. England as the trustee in bankruptcy herein all or any of petitioner's assets or at least or at all so much thereof as added to the assets of the above-named bankrupt will be sufficient to pay all legal expenses of administration and also to satisfy in full all creditors of the bankrupt whose claims are proved and allowable in the above-entitled bankruptcy proceeding, and in ordering, adjudging and decreeing that petitioner herein turn over to said trustee any assets whatsoever.

Wherefore petitioner prays that the said Referee prepare and certify to the above-entitled Court a

record in due form according to law of the proceedings hereinabove referred to and hereby complained of.

That a judge of the above-entitled Court review the said proceedings and record and upon such review reverse the said order of the Referee herein, and further order that said petition of the trustee herein for an order to show cause be dismissed, for such costs as may be allowable against the estate of the said bankrupt, and for such other and further relief as may be proper in the premises.

And petitioner will ever pray.

NATHAN MORAN,

Attorney for Petitioner.

[Endorsed]: Filed Oct. 20, 1947. Referee in Bankruptcy.

(From Certificate and Report of Referee on Petition for Review of Referee's Order. Exhibit "A", referred to in this petition already in record.) [21]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW
OF REFEREE'S ORDER

On petition of the trustee the referee, by his order, directed one F. W. MacKay to turn over to the trustee herein all of his sole individual assets, or sufficient thereof when taken with the moneys in the hands of the trustee, the property and assets of the bankrupt, to pay in full the debts of the bank-

rupt, together with the expenses of the administration.

In response to the order to show cause issued on the petition of the trustee for the making of the order hereinabove referred to, MacKay, as a part of the response, asserted that the petition for said order to show cause "does not state facts or grounds sufficient to support any proceeding nor any relief therein prayed nor any relief whatsoever." The referee prior to the entry of his order denied this contention. [22]

There is no contention made by the trustee that MacKay at any time had in his possession any property, money or assets of the bankrupt. The referee did not find that he had and the sole purpose of the proceeding was to require MacKay in a summary proceeding to turn over to the trustee his own individual assets for the purpose of paying the debts of the bankrupt. In making the order the referee assumed that he had jurisdiction over the assets of one not declared to be a bankrupt. In *Hefron v. Western Loan & Building Co.*, 84 Fed. (2) 301 (C.C.A. 9), the Court said: "It is true, as the trustee contends, that, upon the filing of a petition in bankruptcy, all property in which the bankrupt has or may claim an interest passes under the control of the bankruptcy court and, upon adjudication, title to all property of the bankrupt vests in the trustee as of the day of the filing of the petition." This was later approved by the same Court in *Schultz v. England*, 106 Fed. (2d) 764. It is thus clear that the only property that passes under

the control of the bankruptcy court and title to which vests in the trustee is the property of the bankrupt and not the property of anyone else. The jurisdiction that the referee has to order property in the possession of a third person delivered to the trustee is dependent upon the fact that the property so ordered to be delivered is not the property of the third person, but the property of the bankrupt.

The Circuit Court of Appeals of the Eighth Circuit in *In re Rosser*, 101 Fed. 562, in speaking of the right of a referee to require a third person to turn over to the trustee property in his possession, says: "Two essential facts limit this power and condition its lawful exercise. They are that [23] the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made."

It is urged that the referee, by his facts found and order made, pierced the veil of the corporate entity and found that such corporation was at all times, since its organization, in truth MacKay, the petitioner, and as such the debts of the corporation were the debts of MacKay. However, the petition upon which the adjudication in bankruptcy was based proceeded against the bankrupt as a corporation, as an entity separate and distinct from its

stockholders and the owners of the stock. It was adjudicated as an entity against which an adjudication could be made upon the basis that as an entity it was insolvent and could not pay its lawful debts. If it be true that the debts of the bankrupt were in truth and in fact the debts of MacKay, it is difficult to perceive how the referee would acquire jurisdiction to direct that MacKay turn over to the referee his individual assets to pay his debts when MacKay has never been adjudicated a bankrupt. The adjudication in bankruptcy determines a status. The proceedings are in rem for that purpose. *Local Loan Co. v. Hunt*, 292 U. S. 234. The status determined by the adjudication here was that of a corporation, not of MacKay. The adjudication of necessity declared the bankrupt corporation an insolvent. It did not declare MacKay an insolvent, or establish a status as to him in any manner. If it be a fact that the debts of this corporation are the debts of MacKay, it would not necessarily follow that [24] MacKay himself was an insolvent within the meaning and intent of the bankruptcy laws because he did not pay the debts. If all the assets of MacKay may be taken as the referee directs to pay the debts of the corporation on the theory that they are MacKay's, the result could well be an unlawful preference of creditors by the bankruptcy court, for any debts that MacKay might have contracted in his own name and not in the name of the corporation, and outstanding and unpaid, would not be taken into consideration in the distribution of all of his assets. Those of his creditors would receive noth-

ing on their debts because of a lack of notice or knowledge that all of the assets of MacKay were being taken over by the court of bankruptcy for the payment of his debts and without any opportunity for them to appear and prove their debts against him.

It follows, in my opinion, in making the order he did, the referee acted without jurisdiction; that in not sustaining the contention that the petition did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, the referee fell into error.

It Is Therefore Ordered that the order of the referee dated September 26, 1947, directing the petitioner MacKay to turn over all or any portion of his sole individual assets, be and the same hereby is set aside and held for naught.

Done and dated this 30th day of January, 1948.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Jan. 30, 1948. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that John O. England, Trustee of the estate of Burlingame Products Co., Inc., a corporation, bankrupt, hereby appeals to

the Circuit Court of Appeals for the Ninth Circuit from the order made and entered by the above-entitled Court on the 30th day of January, 1948, on Petition for Review of Referee's order dated September 26, 1947, reversing said Referee's order.

Dated: February 27, 1948.

STANLEY M. McLEOD,

JAMES M. CONNERS,

Attorneys for John O. England, Trustee of the
Estate of Burlingame Products Co., Inc., a
Bankrupt Corporation.

[Endorsed]: Filed Feb. 28, 1948. [26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 18, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: April 8, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed April 8, 1948. [27]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL

To: F. W. MacKay, and Nathan Moran, Esq., his
Attorney:

You and Each of You will please take notice, under the provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the Appellant, John O. England, Trustee of the estate of the above-named Bankrupt, intends to rely upon the following points in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court, dated January 30, 1948, reversing the Order of the Referee in Bankruptcy:

I.

That the District Court, in its Order of January 30, 1948, erred in reversing the Order of the Referee in Bankruptcy dated September 26, 1947, directing F. W. MacKay, as an individual [28] forthwith to turn over to John O. England, Trustee, all of said F. W. MacKay's assets, or at least so much thereof as, added to the assets of the estate of the above-named bankrupt, will be sufficient to pay all legal expenses of administration, and also to satisfy, in full, all creditors of the bankrupt whose claims are proved and allowable in the above-entitled proceeding.

II.

That the District Court, in its Order of January 30, 1948, erred in holding that the Referee in Bankruptcy had acted, and was, without jurisdiction to make his Order dated September 26, 1947, directing the said F. W. MacKay to turn over his assets to the Trustee.

III.

That the District Court, in its Order of January 30, 1948, erred in holding that the Trustee's petition for an Order to Show Cause against the said F. W. MacKay did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever and that the Referee in Bankruptcy erred in not sustaining the contentions of MacKay to that effect.

IV.

That the Findings of Fact of the Referee in Bankruptcy are supported by evidence and that the District Court erred in disregarding the mandatory provisions of Supreme Court General Order No. 47 requiring the Judge of the District Court to accept the Findings of Fact of the Referee in Bankruptcy unless clearly erroneous.

Dated this 17th day of May, 1948.

/s/ JAMES M. CONNERS,

/s/ STANLEY M. McLEOD,

Attorneys for Appellant. [29]

Receipt is acknowledged of a copy of the foregoing Appellant's Statement of Points to be Urged Upon Appeal this 17th day of May, 1948.

NATHAN MORAN,

By E. C. Y.,

Attorney for F. W. MacKay.

[Endorsed]: Filed May 17, 1948. [30]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

John O. England, the Trustee of the estate of the above-named bankrupt, having filed his Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the District Court, dated January 30, 1948, files this, his Designation of Contents of the Record on Appeal and does designate the following portions of the record, proceedings and evidence in said cause as the portions of the record, proceedings, and evidence to be contained in the Record on Appeal herein, to wit:

I.

Order of District Court, dated February 24, 1947, adjudging Burlingame Products Co., Inc., a corporation, a bankrupt. [31]

II.

Order of Burton J. Wyman, Referee in Bankruptcy, approving Trustee's Bond, dated April 22, 1947.

III.

Petition of Trustee for Order to Show Cause upon F. W. MacKay.

IV.

Order of Referee in Bankruptcy, dated July 30, 1947, upon F. W. MacKay, to Show Cause.

V.

Transcript of testimony of hearings before Burton J. Wyman, Referee in Bankruptcy, on April 28, 1947, May 14, 1947, and September 8, 1947.

VI.

Response to Order to Show Cause by F. W. MacKay, dated September 8, 1947.

VII.

Order of Referee in Bankruptcy, dated September 26, 1947, on Petition that F. W. MacKay turn over assets to Trustee.

VIII.

Petition of F. W. MacKay for review of Referee's Order dated September 26, 1947.

IX.

Order of District Court, dated January 30, 1948, overruling Referee's Order of September 26, 1947.

X.

Notice of Appeal dated February 27, 1948.

XI.

Appellant's Statement of Points to be urged upon appeal.

Dated this 17th day of May, 1948.

/s/ JAMES M. CONNERS,

/s/ STANLEY M. McLEOD,

Attorneys for Appellant.

Received copy of the within Designation of Record on Appeal this 17th day of May, 1948.

NATHAN MORAN,

By E. C. Y.,

Attorney for F. W. MacKay.

[Endorsed]: Filed May 17, 1948. [32]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including May 28, 1948, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 18, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 18, 1948. [33]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Burlingame Products Co., Inc., Bankrupt, No. 36674 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of May, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk. [34]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 36674-R

Before: Honorable Burton J. Wyman,
Referee in Bankruptcy.

In the Matter of

BURLINGAME PRODUCTS CO., INC., a Cor-
poration,

Bankrupt.

Monday, April 28, 1947—2:00 p.m.

Wednesday, May 14, 1947—2:00 p. m.

21A EXAMINATION

Appearances:

For the Trustee: James M. Conners, Esq., and
Stanley M. McLeod, Esq.

For Certain Creditors: Nathan Moran, Esq. [1*]

The Referee: What witness do you want on the
stand first?

Mr. McLeod: I guess Mr. MacNeil.

*Page numbering appearing at top of page of original Reporter's
Transcript.

ALFRED J. MacNEIL,

called as a witness for the Trustee. Sworn.

Q. (The Referee): Your full name is what?

A. Alfred J. MacNeil.

Q. Where do you live, Mr. MacNeil?

A. 484 Waller.

Q. San Francisco? A. Yes, sir.

Q. What was your connection with the Burlingame Products Company?

A. Secretary and Treasurer.

Q. Are you familiar with the schedules of the bankrupt? A. I am not.

Mr. McLeod: If Your Honor please, no schedules have been filed by the bankrupt corporation.

The Referee: Proceed to examine him.

Q. (Mr. McLeod): Mr. MacNeil, when was the bankrupt corporation organized?

A. I did not get that.

Q. When was the Burlingame Products Company organized as a corporation?

A. I think it was April.

Q. Of 1946?

A. April 1st of 1946. I am not sure, but March or April.

Q. Did you keep the books of the corporation?

A. Partly, yes. My son kept the books.

Q. Your son? What is his name?

A. Malcolm.

Q. Is there in existence a register of the stock, the shares of stock issued by the corporation?

A. I don't know [2] about that. I cannot answer that question.

(Testimony of Alfred J. MacNeil.)

Q. Do you hold any shares in the corporation?

A. I do not.

Q. Do you know if any shares were issued?

A. I do not. None were ever issued to me.

Q. Do you know whether any were issued to Mr. Mauborgne? A. I do not.

Q. Did you draw a salary, Mr. MacNeil?

A. I was supposed to.

Q. What was that? A. \$100.00 a month.

Q. Were you paid at any time?

A. I was not; three months out of six.

Q. You were paid some? A. Yes, sir.

Q. You met Mr. Costello, Mr. John Costello the Assignee for the benefit of creditors of Burlingame Products Company? A. Yes, I did.

Q. Were you the party who gave him the books and papers that he received?

A. Well, I gave him part of them. I did not have them all.

Q. Did you give him all you had in your possession? A. I gave him all that I had.

Q. Where did the capital of the Burlingame Products Corporation come from?

A. We just tried to work it out. We had some machinery there and started in. What capital we got, we made.

Q. You say "We had machinery there". Would you explain that?

A. We had two or three machines there. [3]

Q. By "We" who do you mean?

A. Well, the Burlingame Products Company.

(Testimony of Alfred J. MacNeil.)

Q. Was there a Burlingame Products Company prior to the time the corporation was organized?

A. I could not answer that question. I don't think so, because we went as Burlingame Products when we went there and started it.

Q. Was there a company known as Western Products Company?

A. Well, I had nothing to do with that. I know nothing about it. I think there was, yes, but that was before my time.

Q. Who owned the machinery and assets that you called Burlingame Products Company prior to its incorporation? A. I don't get you.

Q. You say "We had some machines".

A. There was some machinery moved into the building down there.

Q. Who did it belong to?

A. Who did it belong to?

Q. Yes.

A. Well, I had not a thing to do with it before that. I went into this Burlingame Products Company April 1st, 1946.

Q. Yes.

A. And some of this stuff was in the building when I went there.

Q. How did you happen to go into the corporation? Did you put up some money?

A. What?

Q. Did you put up some money?

A. I did not.

Q. How did you happen to be appointed?

(Testimony of Alfred J. MacNeil.)

A. I went in there to work as Secretary and Treasurer, take care of it; help take care of it. [4]

Q. Who asked you to go in?

A. F. W. MacKay.

Q. Was F. W. MacKay connected with Burlingame Products Company?

A. You have to ask him about that. I cannot tell you.

Q. Don't you know of any interest? He is not an officer of the corporation?

A. No, I don't think so, no. No, he was not an officer of the corporation.

Q. Then, you don't know how he is connected with the corporation?

A. I don't know how he is connected with it, how much he is connected with it, or what he had in it, or anything about it. I went in there April 1st, 1946.

Q. Did he ask you to take this position as Secretary and Treasurer so as to look after or protect his interests, if any, in the corporation?

A. He asked me to go in there and look after the money part of the business.

Q. The money part? A. Yes.

Q. Did he say he had money invested in the company?

A. He did not say anything about that.

Q. Did you sign all the checks?

A. I—well, I think I signed most all the checks. The business has a right to sign checks, as well as I did, Joe Mauborgne.

(Testimony of Alfred J. MacNeil.)

Q. In an unlimited amount? A. Yes.

Q. Were any meetings of the Board of Directors of the corporation held, Mr. MacNeil?

A. When we organized you mean, afterwards, before, or when?

Q. Any time during the life of the corporation?

A. I think there was a meeting when we organized. That is [5] all that I recall.

Q. Just one meeting? At least, only meeting at which you were present?

A. That is right, that is the only meeting I recall.

Q. Who are the officers or directors of the corporation?

A. Myself, Joe Mauborgne and Jack Helms?

Q. How do you pronounce Mauborgne?

A. Mauborgne.

Q. He was the President?

A. He was the President.

Q. Mr. Helms was the Vice-President?

A. That is right.

Q. And who were the directors?

A. The three.

Q. Just the three of you?

A. That is right.

Q. (By Mr. Connors): Mr. MacNeil, where was the place of business of the Burlingame Products Company? A. 621 California Drive.

Q. You were asked to go into the corporation by Mr. MacKay to look after the money part of the corporation. I think I am quoting your words?

A. That is right.

(Testimony of Alfred J. MacNeil.)

Q. Where was the bank account carried?

A. The Bank of America in Burlingame.

Q. How much money was in the bank when you became connected with the corporation?

A. My first deposit, I think, was about \$700.00. I am not sure.

Q. And what was the source of the \$700.00? Where did you get it?

A. Well, some money that was handed to me by Mauborgne. I believe, I think it was by Mauborgne.

Q. Was that cash or a check?

A. I think it was a check. I know it was a check.

Q. Was it Mr. Mauborgne's check?

A. No, it was not. It was a check from—I cannot recall right now the name of the firm.

Q. Was it Mr. MacKay's check? A. No.

Q. Did Mr. MacKay give you any money to deposit in this account?

A. He gave me some money to pay for the electric wiring of the building.

Q. And how much did he give you?

A. No, I cannot recall that right off. It was two or three different times. One time it was \$360.00, I believe, to pay for the electric wiring. One time it was \$100.00 to pay for some fence at the back of the building.

Q. For what?

A. Some fence that we put in back of the building.

(Testimony of Alfred J. MacNeil.)

Q. That is \$460.00. Did you get any other money from Mr. MacKay?

A. Yes, I think the electric wiring came to about \$800.00 or \$1,000.00 and I think he gave me the money to take it all up, whatever it was. I don't just recall what it was.

Q. Now, do the records show that?

A. The records should show that. I turned those records over and I do not have access to those records; I did not have access to those records after September. I don't know when this bankruptcy or anything was filed, but after September 30th I had no connection with it [7] at all.

Q. September 30th?

A. September 30, 1946.

Q. Why did you ask Mr. MacKay for this money to take care of these repairs and installations?

A. Why? I did not ask him.

Q. You did not? A. He furnished it.

Q. Who told Mr. MacKay that the money was needed?

Mr. Moran: That is objected to, Your Honor, as calling for hearsay.

The Referee: This is a 21a examination. You see, we are not bound by rules of evidence.

A. I am telling you, this stuff was mostly done before April 1st when I went in there. I don't recall just when this organization was put together, but I do know I went in about April 1st.

Q. (By Mr. Connors): Well, to refresh your memory, Mr. MacNeil, the corporation was or-

(Testimony of Alfred J. MacNeil.)

ganized on March 16, 1946. I have a certified copy of the Articles of Incorporation.

A. Well, I don't recall just when it was, but I know about April 1st is when I went down there and was getting things ready to open up.

Q. Did you go down there at Mr. MacKay's request? A. I did.

Q. And then, was this \$1,000.00 or more given to you before April 1st or after April 1st?

A. After.

Q. All right. Now, did you ask Mr. MacKay for this money?

A. I did not. The contract was already made and whoever made [8] the contract, whether him or Joe, who it was, I don't know. I did not have anything to do with the wiring contract. I did not know anything about it until I got down there and the bill came in. They knew about it; he knew about it.

Q. Who do you mean by "He"?

A. Joe knew about it and Mr. MacKay, I suppose, knew about it. Anyway, that is where the money came from. I think it was \$100.00 check and a \$700.00 check, if I am not mistaken, or a \$800.00 check. I don't recall the electric bill exactly.

Q. But, you did not ask Mr. MacKay for it?

A. No, I did not ask him for it.

Q. Do you know who asked him for it?

A. No, I think the bill was just presented there. I don't suppose anybody asked for it.

Q. Was Mr. MacKay there from time to time?

(Testimony of Alfred J. MacNeil.)

A. He was there a little while. He left sometime in April, I don't know when.

Q. That is the time he went to Tahiti?

A. Yes.

Q. What was Mr. MacKay's connection with the business?

A. You will have to ask somebody besides me about that, what his connection was. All I know is, I went down to go to work and was to make it out of the business.

Q. What is Mr. MacKay's business?

A. You cannot prove that by me.

Q. How long have you known him?

A. About seven or [9] eight years.

Q. What was his business prior to April 1st when he told you to go down to the Burlingame Products Company?

A. What was his business?

Q. Yes.

A. I can tell you the only thing I know about his business. He is a stockholder in the book concern I am in now.

Q. Do you mean the place of business in this building on 7th Street?

A. That is right. Now, that is all I could tell you about his business. Outside of that I don't know what business he has got.

Q. Were you at the Burlingame Products Company every day?

A. Yes, I think most every day for six months.

(Testimony of Alfred J. MacNeil.)

Q. Prior to Mr. MacKay's trip to Tahiti, how often was he at the place of business?

A. Well, sir, I could not answer that question; probably three or four times, maybe, that I know of. He may have been there many times that I did not know about.

Q. Did you consult with Mr. MacKay regarding the operation of the business?

A. No. The business was not started when he left.

Q. It was not started?

A. It was not doing any business. We was opening up, getting ready to open up.

Q. Did you discuss with Mr. MacKay the details about getting ready to open up? A. I did.

Q. What matters did you take up with him?

A. I don't think I took up anything in particular, only about the building and the rent and a few things like that.

Q. You say you took up with him about the building. Was it about the design?

A. No, I do not know a darn thing about that.

Q. What was the discussion with him regarding the building?

A. About where the wiring was being put in, the amount of wiring they had to have.

Q. Did you discuss the cost of the wiring with him?

A. No, I did not know about the cost of the wiring. I did take up the cost of the wiring first, when I first heard about it being about \$350.00.

(Testimony of Alfred J. MacNeil.)

Q. Outside of this money you got from Mr. MacKay for the wiring, what other investment or moneys did he put into the operation of the business?

A. What other moneys did he put in?

Q. Yes.

A. I could not answer that question.

Q. Who would know the answer to that question?

A. Well, if he put in any that I knew of, I would know about it, but any other moneys, as far as I know, I cannot exactly answer that. The amount of money he gave to me to put in to pay for these bills, I just explained it at the time.

Q. But, all the money he did give you is reflected on the books?

A. All the money he gave me or anybody else gave me is on the book, the bank book.

Q. Is there a record among the corporation's records of this money you received from Mr. MacKay? [11]

A. I don't know whether it is on the corporation's records or not. I marked it on mine. I could not answer about the corporation records.

Q. This corporation was manufacturing bird cages, was it not?

A. That is right.

Q. Was that a patented cage?

A. I don't think so; I don't know. If there was any patent on it, I don't know about it.

Q. Had Mr. MacKay been interested in a similar business before this organization?

A. The only business I know of him being interested in was a dog business before that.

(Testimony of Alfred J. MacNeil.)

Q. Was that the business Mr. Mauborgne was connected with?

A. No, he is in the bird stores. He has canaries.

Q. What was the name of the dog business Mr. MacKay was in?

A. He was just handling dogs of his own, bought and sold them; show dogs. That is the only business I know he was in before that.

Q. Did you know anything about the Western Products Company on Precita Avenue, here in San Francisco?

A. No. I have heard about it, but I do not know anything about that. That was before my time. I have heard a great deal about it.

Q. How long after April 1st did Mr. MacKay leave for Tahiti?

A. I could not answer. I don't remember when he did leave.

Q. Did he return before the 1st of September when you left the business?

A. Just about that time, I think. [12]

Q. Did he come down to the place?

A. Not while I was there.

Q. While he was away, did you communicate with him? A. That was impossible.

Q. You are certain you did not write any letters to Mr. MacKay in Tahiti?

A. I certainly did not.

Q. Advising him of the progress of the business?

(Testimony of Alfred J. MacNeil.)

A. I did not think it was necessary, because I did not think I could get him.

Q. Did your son write to him?

A. No, not that I know of.

Q. Did Mr. MacKay write to you?

A. I don't think so. I don't think I ever heard from him while he was gone.

Q. After he returned, did you discuss the business with him?

A. Some time after, yes, not very soon, because he was sick for a while. I did not see him.

Q. Did Mr. MacKay receive any money from the business? A. Not that I know of.

Q. Did you sign any checks payable to Mr. MacKay?

A. I did not. I signed some payable to MacNeil that I never got.

Mr. Connors: That is all.

(Witness excused.)

JOSEPH O. MAUBORGNE,

called as a witness for the Trustee. Sworn.

The Referee: Joseph O. Mauborgne? [13]

A. Joseph O. Mauborgne, M-a-u-b-o-r-g-n-e.

The Referee: Proceed.

Mr. McLeod: How do you pronounce your name?

A. Mauborgne.

Q. Mr. Mauborgne, you are President of the Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

(Testimony of Joseph O. Mauborgne.)

A. I am, or I was, yes.

Q. Well, you were. Did you invest any money in the corporation?

A. At various times when we were a little on the downward grade, I put a little money in. Not in the corporation itself, no.

Q. I am talking about after you were manufacturing the cages.

A. I put no personal money in there.

Q. Were you formerly connected with the Western Product Company? A. I was, yes.

Q. Was that a corporation?

A. No, it was not.

Q. What was your connection with the company?

A. Well, ran that company with the financial backing of Mr. MacKay.

Q. You ran that company with the financial banking of Mr. MacKay? A. That is right.

Q. Did you put any money in the company?

A. At various times I had to put in something, yes.

Q. I mean, as an investment or to keep it running? A. To keep it going.

Q. During what period were you running the Western Products Company?

A. I don't know the exact date I [13] started, but I believe August or September of 1945.

Q. And when did you become associated with the Burlingame Products Corporation?

(Testimony of Joseph O. Mauborgne.)

A. The date the corporation papers were filed.

Q. Did the Burlingame Products Corporation take over the assets of the Western Products Company?

A. It took over everything I had. It was given to Mr. MacNeil at that time, yes.

Q. What did you get?

A. I don't know. I believe the check was \$800.00 and something.

Q. Are you talking about cash?

A. No, talking about a check.

Q. A check for \$800.00?

A. \$800.00 odd, I believe. It might have been \$700.00 and something.

Q. Was the Burlingame Products Corporation formed as a successor of the Western Products Company?

A. I don't know that I would say successor, practically the same thing going again. I don't think it would be the successor.

Q. Where is the machinery, fixtures, and equipment of the Western Products Company?

A. Turned over to Burlingame Products Company.

Q. And *there* belonged to whom?

A. I would not exactly know, to say who they belonged to. They were built up by the company.

Q. Who owned the Western Products Company?

A. I could not state now; I could not say one way or the other [15] who the exact owner of the company was.

(Testimony of Joseph O. Mauborgne.)

Q. Did you own it?

A. I was working for commissions.

Q. Who was your employer?

A. I would not say I had an employer. Mr. MacKay advanced the money, the financial part of the business for me to run it. I don't really consider I was working for him.

Q. When did Mr. MacKay advance that money?

A. I believe August or September of 1945.

Q. Do you recall the arrangement or any conversation you had with Mr. MacKay when he advanced the money? What was the understanding between you?

A. I was to get 50 per cent of the profits.

Q. Who was to get the other 50 per cent?

A. Mr. MacKay would have drawn that back out towards the money he advanced, I imagine.

Q. Did he withdraw any moneys?

A. No, sir, he did not.

Q. Was the business a profitable one?

A. No, it was not.

Q. Then from August or September, of 1945, to the middle of March, 1946, you ran the Western Products Company or operated it?

A. That is right.

Q. Did you? A. That is correct.

Q. Was it in the same line of business as the Burlingame Products Company?

A. That is correct.

Q. Manufacturing bird cages?

A. That is right, and bird supplies.

(Testimony of Joseph O. Mauborgne.)

Q. Who suggested that the Burlingame Products Company be organized? [16]

A. Mr. MacKay.

Q. Did he inform you of that fact? What did he say to you about it, if anything?

A. He said that we should make a corporation of it.

Q. What was to be done with the assets of the Western Products Company?

A. The assets of the Western Products Company were turned over to Mr. MacNeil. They were not really assets. What cash we had on hand, was not assets, because we owed that much or more.

Q. Mr. MacNeil who just testified as Secretary and Treasurer of the Burlingame Products Company?

A. That is correct.

Q. You were to get 50 per cent of the profits of Western Products Company and Mr. MacKay decided you ought to have a corporation. Had you received any profits from the Western Products Company?

A. No, sir, I had not.

Q. What was the financial arrangement, the financial standing between you and Mr. MacKay when he suggested that you incorporate? Were you to get something representing your profits in the Western Products Company?

A. There were no profits in the Western Products Company.

Q. What were you to get in the Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

A. I was working on the same basis, but there was no written agreement to that effect.

Q. In the Burlingame Products Company what were you to get if it was profitable?

A. I would have got 50 per cent if it was profitable. [17]

Q. Who was to get the other 50 per cent?

A. It was to go to the corporation, I imagine. That is the only understanding I had.

Q. Was it agreed how many shares of stock you were to receive from the Burlingame Products Company?

A. I know nothing about stock. I never saw the books or anything.

Q. Are you a stockholder?

A. Not that I know of. I don't know a thing about it.

Q. Are you a Director of the corporation?

A. Well, I was put in as President. I imagine I was a Director.

Q. Did you ever attend a Director's meeting?

A. I attended a meeting, not a Director's meeting. They held a Director's meeting.

Q. Where was that held?

A. In Mr. Moran's office, I guess some time after April, when the papers came back.

Q. Who told you you were to get 50 per cent of the corporation's profits at the Burlingame Products Company after it was organized?

A. As I say, I have nothing in writing. I just understood that was going to be my salary.

(Testimony of Joseph O. Mauborgne.)

Q. Who gave you that understanding?

A. Well, Mr. MacNeil, the Vice-President, myself, and Mr. MacKay, all of us had that understanding. There wasn't anything written up about it though.

Q. Do you know, as President of the corporation, whether anyone aside from the Western Products Company or Mr. MacKay invested [18] any money in the Burlingame Products Company?

A. Yes, I do.

Q. Who?

A. There was with me, Mr. Wehr. He put money in one time.

Q. I don't get the name? A. Wehr.

Q. Who is he?

A. He happens to be my brother-in-law.

Q. How much did he put in?

A. I think somewhere around \$400.00-odd.

Q. When was that, Mr. Mauborgne?

A. Around November or December, I believe, of 1945. You are talking of the Western Products Company, aren't you?

Q. That was in the Western Products Company?

A. That is correct.

Q. Well, did you invest any in the Burlingame Products Company? A. No.

Q. Do you know of anyone—I will repeat my question—do you know of anyone besides Mr. MacKay and the Western Products Company who did invest any money, fixtures, property or assets?

(Testimony of Joseph O. Mauborgne.)

A. You mean as a gift or something? No, I do not.

Q. So far as you know, did all this money, machinery, everything else come from Mr. MacKay?

A. I would not say it all came from Mr. MacKay, no. It came from the original start he gave me, machinery we brought as we worked along. He did not purchase all the machinery in the place by any means. [19]

Q. He set you up as the Western Products Company?

A. He started me out as the Western Products Company with \$1,500.00. I paid \$1,400.00 for machinery in it. He financially backed me in the business.

Q. Did you sign checks on the Burlingame Products Company?

A. Once in a while. My job was doing the buying. When I went to buy, if it was a small amount, whatever material I picked up, I gave a check for.

Q. Did you have authority to draw any amount on the bank account?

A. Up to \$100.00; over \$100.00 it required two signatures.

Q. Who were the two signatures?

A. Mr. MacNeil and myself.

Q. Mr. MacNeil and yourself, you say?

A. That is correct.

Q. Did the Burlingame Products Company own any automobiles, or trucks?

(Testimony of Joseph O. Mauborgne.)

A. Yes, it did. We owned a truck. I would say, not that we owned it. I don't know whether to say we owned it or not. I financed the truck myself in my own name. The truck was actually carried in my name until we went through bankruptcy or the Court over here, and I turned the pink slip over to the then-existing——

Q. Mr. Costello?

A. No, I turned it over to the man that bought the place down there. The truck at that time was still in my name.

Q. It was in your name, but belonged to Burlingame Products Company?

A. I would say legally that it [20] belonged to it, yes.

Q. You don't claim that it belonged to you individually, do you?

A. No, I do not. I claim it was carried under my name, not the name of the company.

Q. Whom did you endorse the pink slip to, Mr. Mauborgne?

A. I cannot remember the name of the fellow—Jarnigan. I don't know whether I endorsed it to the name of Jarnigan or the name of the company Jarnigan is now running. In fact, I don't believe I endorsed it at all. I signed the slip and he put his own name in.

Q. Was that turned over at the request of Mr. Costello?

A. No, it was not. I turned it over on my own

(Testimony of Joseph O. Mauborgne.)

hook. I had the pink slip in my pocket and I wanted to get rid of it.

Q. How did it happen that you turned the truck over to Mr. Jarnigan when you had not turned it over to Mr. Costello, the Assignee for the benefit of creditors?

A. I understood that whatever his name is, down there, bought the place. I figured the truck went along with it.

Q. Did Mr. Costello ever ask for the truck?

A. I never heard a word about it.

Q. Do you know whether he knew the corporation had it?

A. I could not even tell whether he knew that or not.

Q. Did you draw a salary from the corporation, the Burlingame Products Company?

A. No, I did not draw a salary. I believe I drew \$100.00 or \$150.00 for mileage and gasoline for my car. [21]

Q. And that is all? A. That is all.

Q. Do you know whether any shares of stock were issued? A. I do not know.

Q. Did you get any? A. I did not.

Q. Do you recall at the organization meeting, whether it was agreed as to who should get shares of stock?

A. Yes, I believe—I don't know whether it was agreed who would get shares of stock—but I believe all the officers were going to take stock. I be-

(Testimony of Joseph O. Mauborgne.)

lieve we arranged that we would buy one share, two shares, four shares, some odd sum.

Q. How many were you to get, do you recall?

A. I could not tell exactly now. I believe it was \$100.00 or something like that.

Q. (By Mr. Connors): How long was the Western Products Company in business on Precita Avenue?

A. I don't know the exact date. I believe from August or September until the following April.

Q. And why was the business moved from San Francisco to Burlingame?

A. We had a fire in the place and had inadequate wiring. I was requested by the Fire Department to close the building up. The electrical department closed the building up. We had no building to go to. I could not find a suitable one in San Francisco.

Q. Who found the place in Burlingame?

A. Mr. MacKay located it first.

Q. He did? Did you have a lease or a month-to-month tenancy [22] down there?

A. We had a lease.

Q. Whose name was the lease taken in?

A. We had it put in the corporation.

Q. The lease was in the name of the corporation?

A. That is correct.

Q. And were any payments made on the lease?

A. Yes, we paid the first month and the last two months, I believe.

Q. How was that paid?

(Testimony of Joseph O. Mauborgne.)

A. Cash money, or a check rather.

Q. A check of the corporation?

A. I don't believe it was. I believe it was a check on Western Products Company, because we had arranged for the building some four or five months before we got it.

Q. Was the Western Products Company a corporation? A. No, it was not.

Q. I have before me a letterhead, Joseph Mauborgne, President and General Manager.

A. Well, we just put that in there for no reason. We had no corporation or anything. That was just the way we listed it.

Q. Was the Western Products Company a fictitious name? A. I imagine it was.

Q. Used by F. W. MacKay?

A. I would not say it was used by F. W. MacKay, no.

Q. Do you know whether a certificate of doing business under the name of Western Products Company was filed by Mr. MacKay?

A. I could not tell you that. [23]

Q. This profit sharing agreement between you and Mr. MacKay, was that verbal or in writing?

A. Verbal.

Q. Did you have any interest in the business other than the right to receive 50 per cent of the profits?

A. What do you mean by interest?

Q. Did you own any part of the business?

A. Did I own any part of the business?

(Testimony of Joseph O. Mauborgne.)

Q. Yes.

A. I don't know whether you would say I owned it. I put some money in.

Q. How did you put it in, as a capital investment?

A. No, it was not a capital investment. We were short on the payroll, something like that, especially after we had that fire.

Q. I will put it this way: Were you a partner of Mr. MacKay's?

A. No, I would not say I was a partner.

Q. What would you say?

A. I would not know under the arrangement what I was.

Q. Were you responsible for any bills of the Western Products Company?

A. Well, I paid several of them, yes.

Q. Why did you pay those, because of partnership obligations?

A. Because, I had signed for them. I had signed to turn the gas and lights on. I signed things like that myself. Someone had to sign or the gas and light company would not turn it on.

Q. Those are the only bills you paid?

A. That is correct.

Q. Were you liable for the other bills?

A. I imagine I was liable for the other bills. I would have been; I signed for [24] everything. I was the one doing the buying, except the gas and electric, and I signed that.

(Testimony of Joseph O. Mauborgne.)

Q. In what name was the bank account carried?

A. Western Products Company.

Q. Did you have authority to draw checks from the bank account? A. Everything.

Q. Did Mr. MacKay draw any checks on the bank account? A. No, he did not.

Q. Did he have authority to do it?

A. He did.

Q. Now, you testified you got \$1,500.00 from Mr. MacKay when the business opened. Did he put in any other money?

A. He did. On Precita Avenue, you mean?

Q. Yes.

A. After the fire he put in another \$500.00, I believe. I did not even have money to make the payroll and I had a completed bunch of cages burned. At that time I think he invested another \$500.00 or \$600.00 after that time, prior to the time we moved to Burlingame.

Q. How much money did you put in the Western Products Company?

A. I would not be able to know. I never kept track of it.

Q. Was that a loan?

A. No, it was not a loan. I just put it in as I needed it, that is all.

Q. Well, how were you to get it out, as the repayment of a loan, or was this to come out in your 50 per cent profit-sharing arrangement?

A. I made no arrangement about it.

Q. Now what authority did you have in the

(Testimony of Joseph O. Mauborgne.)

Western Products Company? The letter said Martin R. Wehr was General Manager. [25]

A. He was the shop foreman, really. That is all he was.

Q. Who was in charge of the business, you?

A. I was.

Q. After the Burlingame Products Company was organized, were you still the manager?

A. No, I was not. I had nothing to do with the inside of the shop at that time. I hired a foreman other than Mr. Wehr.

Q. Who fixed the prices at which the cages would be sold?

A. The established prices of the Western Products Company.

Q. You continued to sell at the same price?

A. Yes, we did.

Q. Now, when you moved to Burlingame, was Mr. MacKay in San Francisco at that time, or had he gone to Tahiti?

A. No, he was here at the time we moved down. I don't know whether he was. We were so long straightening up, a month or a month and a half before we moved there. I don't know just the exact date he left.

Q. Who had charge of hiring and firing the employees?

A. The foreman we had at the time we went to Burlingame.

Q. Who was the immediate superior of the foreman?

A. Either Mr. MacNeil or myself.

(Testimony of Joseph O. Mauborgne.)

Q. How often was Mr. MacKay at the Burlingame place?

A. I think he was only there four or five times. That is all I saw him. I was not there all the time, myself. I did most of the buying.

Q. What conversation did you have with Mr. MacKay regarding the operation of the business?

A. Well, nothing [26] so far as the financial is concerned.

Q. Who took those up with him?

A. Those were taken up with Mr. MacNeil.

Q. What discussion did you have with Mr. MacKay as part of the business?

A. He came and looked where we had the welders set up and suggested a different arrangement for the welders. On the machinery, he thought we ought to have a well-equipped plant; he suggested that we order different machinery from time to time, improve our plant, if we obtained enough money to buy it.

Q. Why was Mr. MacKay making those suggestions?

A. Why was Mr. MacKay making those suggestions?

Q. Yes.

A. I guess it came into his head to make them. He was financially interested. Certainly, a man that put his money there would have something to say, wouldn't he?

Q. What financial interest did Mr. MacKay have in the corporation?

(Testimony of Joseph O. Mauborgne.)

A. Other than putting up some money, I don't know. Evidently, he would have been a stockholder, or is a stockholder if stock was issued.

Q. How much did he put in the corporation?

A. I cannot tell that. I never saw the books or knew anything about them until they were taken over by John Costello.

Q. You were asked about a truck which you say you turned over to the purchaser?

A. That is correct, a Chevrolet Pick-up. Originally, I believe \$180.00 or \$190.00, the original purchase price, was paid out of money from the Western Products Company. The balance was carried on a financed loan from the Seaboard Finance Company in my name and paid off by the Burlingame Products Company in a lump sum after I believe two or three payments were made.

Q. Those payments were \$35.60 a month?

A. I don't remember exactly; somewhere in there, yes.

Q. This truck was subject to a chattel mortgage to the Seaboard Finance Company and the mortgage also carried a 1937 Olds Sedan?

A. That is right; that was my car. I was financing a car there at the same time, that it was necessary to finance the truck. When I came down with the truck, they put the two into one contract, but the payments made by the Burlingame Products Company in the account book will not show the full \$35.00. Each month. I paid one month and the Burlingame Products Company the next month.

(Testimony of Joseph O. Mauborgne.)

Not the total amount of that was paid by the Burlingame Products Company.

Q. While Mr. MacKay was in Tahiti did you ever communicate with him?

A. I did not. I have never written a letter to Mr. MacKay in my life either here or any other place.

Q. Did you ever hear from him while he was gone? A. I never did.

Mr. Conners: That is all.

(Witness excused.)

The Referee: Call your next witness. [28]

F. W. MacKAY

called as a witness for the Trustee, sworn.

The Referee: Your full name is what?

A. F. W. MacKay.

The Referee: Proceed.

By Mr. McLeod:

Q. Mr. MacKay, you have undoubtedly heard the testimony of Mr. MacNeil and Mr. Mauborgne?

A. I have, sir.

Q. And reverting back to the Western Products Company, is Mr. Mauborgne's testimony correct wherein he stated that you had financially backed him in the Western Products Company?

A. That is right.

Q. With an agreement that he was to get 50

(Testimony of F. W. MacKay.)

per cent of the profits and you to get the other 50 per cent? A. That is correct.

Q. In March of 1947, the Burlingame Products Company was organized as a corporation, was it? 1946, beg pardon. Was that at your suggestion or instigation or desires?

A. Do you want to get a statement?

Q. Yes, we would like to have your statement.

A. I will give it *to*, if you wish me to.

My understanding of the whole operation is that in about August of 1945 Mr. Mauborgne found a chap that lived, I think at the time it was on O'Farrell, it may have been another street, that had a little welder and some other equipment for making bird cages. He became interested in this stuff and came [29] and asked me if I would purchase it for him; I went over and saw this equipment and agreed to purchase it, put him in business; Mr. Mauborgne thereupon leased a store—what was that street?

Q. Precita?

A. Yes. The welders were put in there and the equipment was moved in. Mr. Wehr, sitting back there, his brother-in-law, and Joe ran the shop; I was the angel of the outfit, in my opinion. That is what I was. Then, as things became difficult and more difficult, I kept putting in money. I could not tell the exact amounts or the exact specific time. If you wish it, I can look up the old checks and see exactly what I paid in. Sometimes it would be \$100.00, sometimes \$200.00, \$300.00, \$400.00, or

(Testimony of F. W. MacKay.)

\$500.00, depending on the needs of the welder outfit to operate. I was not interested particularly in the management of it. That was left entirely to Mr. Mauborgne and Mr. Wehr. I backed him financially. I liked Joe and I liked his brother-in-law. I wanted to see them make something out of it. That started the Western Products Company, as far as I know.

Q. Well, the Western Products Company ended in March, 1946, and the Burlingame Products Company began?

A. My understanding then was, that in return for the money I had put in, that I was to take over the assets and they were to be turned into the Burlingame Products Company when formed and I would get stocks in the Burlingame Products Company in return for the money I had put in. [30]

Q. Was there an amount agreed upon by you?

A. Well, I believe there was an amount agreed upon for the value of the equipment and so forth of the Western Products Company, but I would have to talk that over with Mr. Moran. He was the corporation's counsel. The facts of the matter are, that at that time I had been serving here during the war in defense work and I wanted to get back to my residence in Tahiti and I simply dumped the whole thing in Mr. Moran's lap, to get the corporation in shape. I did not want to take personal responsibility for the corporation. I wanted to get out of the country. In fact, when I went to Tahiti,

(Testimony of F. W. MacKay.)

I did not expect to return, but I found conditions so bad that I returned.

Q. How many shares of stock were you to get?

A. I cannot remember what was to be issued for the proportionate amount of equipment and assets turned in by the Western Products Company and the additional money I put in. In fact, I noticed one statement was not made here. Just before I left, I gave Mr. MacNeil a check for \$2,000.00 to carry them along. If you wish to, I think you can verify that through Mr. MacNeil.

Q. Wasn't the amount that was agreed upon as your investment about \$8,000.00?

A. No, I could not say as to that. I could say probably somewhere in that neighborhood. I don't remember now exactly the amount agreed on. It was what they considered the value of what I had put in.

Q. Were you ever a stockholder of the Burlingame Products Corporation?

A. I have never received any stock. [31] I was supposed to receive stock for the moneys and equipment put in. I never have received any.

Q. Do you know why you did not?

A. I spoke to Mr. Moran about why no stock was issued. He said they never had been able to receive a——

Q. Permit?

A. A proper statement from the officers of the Burlingame Products Company to present to the—

(Testimony of F. W. MacKay.)

who is the chap who issues stock? You have a name for it in California.

Q. The Corporation Commissioner?

A. The Corporation Commissioner.

Q. Who is Mr. Helms?

A. Mr. Helms was a friend of mine who was my immediate superior, the Director of Civilian Defense in San Francisco during the war and I served as a staff officer under him.

Q. Was he at all active in this corporation?

A. You see, I left just after it was formed, for Tahiti and I never returned until it was bankrupt.

Q. Did he invest any money in the corporation?

A. I believe each one of the officers had to agree to make an investment. I don't know what the amount was. That you could probably get from the stock.

Q. Were you to make any other investment than the amount you already invested?

A. Nothing definite was understood about that, but just before I left, as I say, I did invest an additional \$2,000.00. That was turned over to Mr. MacNeil. [32]

Q. You don't know whether Mr. Helms put any money in?

A. That I could not say. I don't know what the others did. I can testify to my own investment.

Q. Did you introduce Mr. Helms to the business, as it were?

A. Well, yes.

Q. And did you install Mr. MacNeil as the Sec-

(Testimony of F. W. MacKay.)

retary and Treasurer of the Burlingame Products Company?

A. I would not say I installed him, no. At the time of the organization, he was elected as Secretary-Treasurer.

Q. Did you have any understanding with him that he, while serving as such officer, should sort of look after your interests, see that they were properly protected?

A. Naturally, he would look after the interest of any stockholders. I believe it is the bonded duty of a treasurer, at least, in any other corporation I am connected with.

Q. Aside from the ordinary general obligations of an officer, did you and Mr. MacNeil have any conversation or understanding on that score?

A. Just that we are friendly and I hoped and believed he would be an honest treasurer for the company. I had confidence in him; the others seemed to have, and he was elected.

Q. Had you had previous business dealings with Mr. MacNeil?

A. I am associated with his son in business in the MacNeil Book Store. Mr. MacNeil was in the store.

Q. You have known him for a period of time prior to the corporation?

A. I have know him six or seven [33] years. I always found him to be a very honest gentleman.

Q. Well, were you the one who suggested his name as Secretary-Treasurer?

(Testimony of F. W. MacKay.)

A. I cannot say exactly who nominated him Secretary-Treasurer.

Q. Did you tell Mr. Mauborgne or Mr. Moran that you knew Mr. MacNeil?

A. I suggested that he come into the corporation, yes. I don't remember exactly who nominated him for his position.

Q. I did not mean the nomination.

A. Right.

Q. I mean the investment for the stockholding. Are you a creditor of the Burlingame Products Company, Mr. MacKay?

A. I have already told you I am the angel. What I have got in has gone.

Q. Well, have you filed any proof of debt in this proceeding?

A. I don't claim anything, because I consider what I put in there as lost. I took a gamble on the ability of this gentleman to make money; he did not. All right; I lost it.

Q. Do you intend to file a claim?

A. I don't see that I have a right to file a claim honestly, now. I intended honestly to buy stock in it; I have no claims against it.

Q. Mr. MacKay, you were getting, rather it was intended that you would get 50 per cent of the profits of the Western Products Company?

A. I think Joe has got that a little—oh, the Western Products?

Q. The Western Products.

(Testimony of F. W. MacKay.)

A. Yes, if there was any profit I [34] was to get 50 per cent of the profit.

Q. When the assets of the Western Products Company were turned into the Burlingame Products Company, what proportion, in the form of shares of stock, were you to get?

A. I think it amounted to somewhere between \$6,000.00 and \$8,000.00. I forget how much stock I was to get out of it. I believe Joe was to get something like \$500.00 of stock. I have forgotten now, for his investment, and I made the personal agreement with Joe that—that is, we made the personal agreement, the corporation, that he was to receive a salary of 50 per cent of the profits. That was generally understood. I don't know if it was ever voted on or anything like that. I think it was generally understood. At least, that would have been my understanding if there had been profits, so far as my dividends. I would have honestly given him half of it.

Q. (By Mr. Connors): Were you the sole owner of the Western Products Company, Mr. MacKay?

A. I never considered I was the owner at all. I considered that I backed Mr. Mauborgne in the company pure and simply. He was the owner and operator of it because I, simply, as I said, was the angel of this thing, and I have been of all parts of it, so far as I see.

Q. Then, all the assets of the Western Products

(Testimony of F. W. MacKay.)

Company were owned by Mr. Mauborgne. Is that it?

A. Well, it was my understanding that when the Burlingame Products Company was organized, those were turned over to me in [35] a way for the money I had invested in there. That is the reason I did not want to run it as a privately owned thing with me out of the country. That is the reason the corporation was organized. They had to have more money, had to be moved. I think Mr. Mauborgne or one of the gentlemen testified there had been a fire out there and the wiring was inadequate and they had to have more money, had to have a new place, and my understanding was the assets were to be turned over for what I invested and turned into the Burlingame Products Company at the moment of inception of the corporation.

Q. As I understand it, if you had not intended to take your trip out of the United States, the corporation would not be organized?

A. I think it would have been, yes, because the investment was becoming heavy; I would not have put in additional sums of money. I think subsequent to moving to Burlingame, probably I put in \$3,000.00 or \$4,000.00. I could not tell the exact amount, somewhere around there.

Q. Was Mr. MacNeil selected to watch your financial interests?

A. He was selected to watch all the financial interests, because of my belief that he was honest and the rest of us agreed he was honest.

(Testimony of F. W. MacKay.)

Q. If you had not made the trip to Tahiti, there would have been no necessity of having anybody watch your interests?

A. We would have formed a corporation anyway, because I believe in corporations. I believe it is the only way to conduct a business, personally.

Q. How long after the corporation was formed did you make your trip?

A. I left here about the 2nd day of May, approximately.

Q. So, that was about six weeks after?

A. It was in May that I left for Tahiti.

Q. Mr. Mauborgne said that you were down to the new place of business in Burlingame and made remarks about the installation of equipment, comments about new equipment.

A. Naturally, as I have gone to an Arizona mine and looked at the mine and other properties I am interested in. A stockholder, although not a director, is always interested in a corporation. At least, I am. I am not a director of the MacNeil Company, but I often drop in to speak to Mr. MacNeil and to see how they are getting along. Naturally, I am interested. It is a corporation, and successful.

Q. What is your business, Mr. MacKay?

A. I am retired, but in my active days I was interested in mining in the Northern Range of Wisconsin and Minnesota.

I might say that nobody regrets the failure of this company more than I do. I had great hopes

(Testimony of F. W. MacKay.)

that it would be successful or I would not have gone to the expense I did to try to set it up right, try to equip it with good machinery.

Q. How old are these claims against the business? Do they go back prior to the formation of the corporation?

A. I don't believe so. As far as I know, everything prior to the formation of the corporation is paid up. At least, that [37] is what Joe informed me lately. I don't know.

Q. Did you ever receive any money from the corporation?

A. Sorry; I never received a cent. I put it in. If you find any that I could receive after everybody else is paid, I will be glad to get it.

Q. When did you return from Tahiti?

A. I think it was about October 15.

Q. Was the Burlingame Products Company in operation then?

A. They told me it was in very bad shape and was closed. I think the Sheriff was down there at that time. I was so utterly disgusted, I never went near it when I came back.

Q. While you were away, did you receive letters from anyone about the operation of the business?

A. The only word I received was from the corporation counsel, stating he was trying to get a statement from the officers.

Q. Did you write to anyone about the operation of the business?

A. No, because by that time I knew I was re-

(Testimony of F. W. MacKay.)

turning from Tahiti. I found conditions dreadfully bad there, as they are in all foreign countries today. I can tell you, you think it is bad here, but it is a lot worse there. Anyhow, I wrote to no one, because I intended shortly to return to the United States.

Mr. Conners: If the Court please, no further examination of these three persons who were subpoenaed today. We would like the matter continued and each of them instructed to return unless they are notified to the contrary, and I suggest about three weeks. [38]

Mr. McLeod: I wonder, Mr. Moran, if you would mind making a statement that would clarify the issuance of the stock, or the arrangements made about the issuance of the stock, since they refer to you?

(Witness excused.)

Mr. Moran: At the time the corporation was formed, there was no financial set-up and the understanding was simply that when the values of the assets were ascertained, there would be stock in proportion to what their value was, together with some cash payments to be made by the three directors of the company, all subject to the approval of the Corporation Commissioner. I suppose, by reason of moving the plant, all that sort of thing, getting the business established and going, things were in considerable confusion and so I never had a financial statement which I considered would be satisfactory to the Corporation Commissioner. That

is the reason for the delay in filing the application to issue stock.

Mr. McLeod: Was he correct in his recollection of the amount of a figure around \$8,000.00 as representing Mr. MacKay's claim?

Mr. Moran: If so, that was my computation and estimate, according to his recollection of what he thought he had put in.

Mr. McLeod: About \$8,000.00 altogether. No permit was ever asked for?

Mr. Moran: No application.

The Referee: I will continue this to May 14th, at 2:00 [39] p.m., and the witnesses who were here today will return at that time.

(Continued to May 14, 1947, at 2:00 p.m.)

Wednesday, May 14, 1947, 2:00 P.M.

Appearances:

For the Trustee: Stanley M. McLeod, Esq.

For the Witness F. W. MacKay: Nathan Moran, Esq.

The Referee: Are you ready to proceed in the Burlingame Products Company?

Mr. McLeod: I thought Mr. Conners was going to be here. Until he comes, can I ask a few questions?

The Referee: Go ahead. Who do you want on the stand?

Mr. McLeod: Mr. MacKay.

F. W. MacKAY

having been sworn previously, recalled.

By Mr. McLeod:

Q. Mr. MacKay, I may be repeating some questions I asked you before, but in connection with the Western Products Company, at the time that their assets were transferred over to the Burlingame Products Company, I believe you testified that you were to receive shares of stock in the bankrupt corporation, that is, the Burlingame Products Company, representing the value of the machinery, equipment, stock in trade and so on?

A. That is what I understood, yes.

Q. Transferred from the Western Products to Burlingame Products? A. That is right.

Q. Am I correct in assuming then that you considered yourself the owner of the Western Products Company? [41]

A. Joe Mauborgne was the owner. I backed him up; I never got paid up.

Q. Did he give you a note or any other evidence?

A. No.

Q. It was entirely orally?

A. Entirely orally.

Q. How much did you advance to him to set him up in business in the Western Products Company?

A. I cannot tell now. The books of the Western Products Company should show that, how much I advanced from time to time. I should say, oh, I could not give you an exact statement, somewhere between \$4,000.00 or \$5,000.00, I presume, from time to time.

(Testimony of F. W. MacKay.)

Q. It was not a lump sum?

A. No, from time to time, and purchases.

Q. As he required it?

A. Originally I purchased the equipment he wanted to start in this cage business. Then from time to time I paid for additional machinery and when the company moved to Burlingame and before the Western Products was formed, or the Burlingame Products, I advanced money there for rent and for wiring the building and one thing and another. I don't know exactly what it was all used for now.

Q. Do you know the basis on which Mr. Mauborgne was to get his shares of stock? You were to get yours on the basis of the amount of money you advanced to him? A. Yes.

Q. Do you know how his proportion was figured?

A. No, I do not. He subscribed to some shares of stock. I don't know how many. I don't even know what the par value of the stock was, but I think it was \$500.00 worth that he subscribed [42] to. That stock, I suppose, was to come out of the profits or out of an investment, I don't know.

Q. Do you mean that he subscribed cash at the time the Burlingame Products Company was organized?

A. That I don't know. I can only tell what I did. All of those matters were handled by the counsel for the company, Mr. Moran.

Q. In connection—by the way, do you know whether the Western Products Company merely

(Testimony of F. W. MacKay.)

rented its place of business or did it have a lease?

A. I don't know whether it had a lease or not. It might have had a lease, or might have rented from month to month. Mr. Mauborgne could tell that. I know it was in his name, whatever the arrangements were.

Q. In connection with the lease of the Burlingame property, where the bankrupt conducted its business——

A. Yes.

Q. You entered in the lease?

A. Originally, it was made in my name with the provision that it should be turned over to a California Corporation as soon as that corporation was formed, in which I was to be a major stockholder. That was part of the lease.

Q. What were the circumstances under which you undertook to put your name on the lease?

A. Well, the necessity of that was a matter of establishing credit until such time as the corporation was formed. [43]

Q. In other words, it was considered that your name was better than Mr. Mauborgne's?

A. I don't know as to that. I only know they asked me to sign it and I did sign it at the time.

Q. Who asked you to sign?

A. The realty company in Burlingame.

Q. Did you pick out the location, interview the realty company?

A. Who?

Q. The realty company.

A. Mr. Mauborgne and I together. I went down with him.

(Testimony of F. W. MacKay.)

Q. Both together?

A. Yes, he was there.

Q. You signed individually?

A. With the right of transferring to the corporation, yes.

Q. Which was later done?

A. Which was done. Wait a minute. Can I ask you a question?

Q. Sure.

A. Was it later transferred to the corporation? I understood it was. That is correct, isn't it?

Mr. McLeod: It contained such a provision permitting Mr. MacKay to transfer?

Mr. Moran: The provision was in the original lease.

The Witness: The time I got this, the corporation was in process of being formed. That was my understanding.

Q. (By Mr. McLeod): Did you have to put up a deposit on the lease? A. Yes, I did.

Q. How much, do you recall?

A. I think I put up the first and last months' rent, as I remember. I could not say; the lease will tell that. [44]

Q. This may be something you are not familiar with, but at the time the Western Products Company became the Burlingame Products Company, I understood Mr. Mauborgne to say that the Western Products Company's account was closed out and if he had any moneys, they were transferred to the Burlingame Products Company.

(Testimony of F. W. MacKay.)

A. That is what I understood from testimony here. Personally, I could not say.

Q. Do you know whether, at that time, all of the liabilities of the Western Products Company were paid, or were they assumed by the Burlingame Products Company?

A. Well, no, I don't know as to that. I assume, if they assumed the assets, they must assume any liabilities. I would not know as to that. That would be a matter for the officers of the corporation.

Mr. McLeod: I think that is all I have, your Honor, of Mr. MacKay, reserving the right for Mr. Conners, if he does appear while this hearing is in session, to recall him.

(Witness excused.)

JOSEPH O. MAUBORGNE

having been previously sworn, recalled.

The Referee: You have been sworn already.

By Mr. McLeod:

Q. Mr. Mauborgne, when the Western Products Company ceased operations, I understood you to testify at the last hearing, that you closed out the bank account? A. That is correct.

Q. And was there any surplus?

A. There was the [45] original check we started with, \$800.00 or \$900.00, whatever the check was.

Q. That was redeposited to the account opened in the name of Burlingame Products Company?

(Testimony of Joseph O. Mauborgne.)

A. That is correct.

Q. Did you, at that time, did you, prior to the opening of the Burlingame Products account, pay all the liabilities of the Western Products Company?

A. No, I did not.

Q. You paid the Western Products Company's liabilities, then, from the Burlingame Products Company's account?

A. That is correct.

Q. Was there, to your knowledge, any written agreement between Western Products Company and Burlingame Products Company as to the assumption of liabilities of the Western Products Company?

A. No, there was not, not that I know of.

Q. In other words, for all practical purposes, it was merely a change of name?

A. That is correct. Incidentally, I told you I paid the Pacific Gas and Electric Company's bills for the Western Products Company and they refunded that to me the other day.

Q. Did you pay that out of the checking account of Burlingame Products Company?

A. No, I paid that money. They came to me and said they would shut the lights off if I did not. I paid for that under my own name and they refunded that to me.

Q. That was while you were in business in Burlingame?

A. No, it was just refunded the other day.

Q. I say, it represented electricity furnished to Burlingame [46] Products Company?

(Testimony of Joseph O. Mauborgne.)

A. No, it represented electricity furnished to the Western Products Company.

Q. How much did it amount to?

A. \$15.13.

Q. And you paid the original bill from your own private, individual funds?

A. That is correct.

Q. Mr. Mauborgne, when it was decided to form the bankrupt corporation and issue stock, on what basis were the number of shares allotted to you?

A. I could not tell you anything about the shares.

Q. What?

A. I could not tell you anything about the shares.

Q. Do you know how many you were to get?

A. I don't know anything about that, no.

Q. Were you to put up any money?

A. That I don't know. I believe it was understood that each of us was to put up \$100.00, each, something like that, I could not tell you more than that.

Q. Why don't you know?

A. Well, I know nothing more about it than that. I was to take some shares after it got going, but how much it amounted to, that I could not tell you.

Q. Who told you you were to put up \$100.00?

A. I think it was agreed among us at that meeting.

Q. Between Mr. MacNeil, Mr. MacKay—

A. No, Mr. MacNeil, myself and whoever the Vice-President was.

(Testimony of Joseph O. Mauborgne.)

Q. Helms? A. Helms, that is right.

Q. Did you have a lease on the premises where you operated the [47] Western Products Company?

A. No.

Q. That was a month-to-month tenancy?

A. That is right. I got to thinking after you asked me the last time I was on the stand something about money to finance the Burlingame Products Company, if we received more in cash. We borrowed money while Mr. MacKay was away.

Q. Borrowed? A. Yes.

Q. From whom?

A. From Mr. Herber and Mr. Schofield.

Q. Were they repaid?

A. No, they were not.

Q. Are they creditors of the Burlingame Products Company? A. That is right.

Q. How much was this?

A. I don't know; some \$2,000.00, I believe.

Q. Mr. Schofield is the representative of the Burlingame Sales Company?

A. That is correct.

Q. That took your entire products?

A. Yes.

Q. Who is Mr. Herber?

A. Well, Mr. Herber, I believe is the owner of that.

Mr. McLeod: I see.

A. I don't know whether you would call that money put up for financing or money loaned us to go on with the business.

(Testimony of Joseph O. Mauborgne.)

Q. Did you give any notes?

A. Yes, we did. We paid off when we came there, \$100.00 every two weeks, something like that.

Q. Do you know whether those appear on the corporation's books? A. I am sure they do.

Q. Who kept the books, by the way?

A. Mr. MacNeil had the books at the book store.

Q. Of Burlingame Products Company. Who kept the books of Western Products Company?

A. I have those books.

The Referee: Mr. Herber has a claim on file here for \$523.92.

The Witness: That is one of them, your Honor.

Mr. McLeod: I think also, that Mr. Schofield has a \$2,000.00 claim, or something like that.

A. The original money borrowed, I believe, was only \$500.00. That comes to \$523.00 now.

The Referee: With interest.

A. With interest.

The Referee: Yes.

The Witness: How much was it originally, \$500.00?

The Referee: \$500.00 with six per cent interest.

A. I am sure something was paid on that. Does it say something was paid?

The Referee: It is dated June 28, 1946, and note due to date.

A. Maybe it is the other one. We made a few payments of \$100.00 a week on one of those two notes.

(Testimony of Joseph O. Mauborgne.)

Q. (By Mr. McLeod): Would your books show those payments?

A. I believe they would, yes. They were paid with checks.

Q. Mr. Mauborgne, when you set up business of the Western Products Company, Mr. MacNeil advanced you cash, did he? [49]

A. Mr. MacKay.

Q. Mr. MacKay, I beg your pardon.

A. That is correct.

Q. And then, did you go out and purchase the necessary equipment? A. I did, yes, I did.

Q. You did all the purchasing?

A. That is right. We bought the majority of the stuff from one man and bought it as a unit.

Q. You paid cash for it?

A. That is correct, \$1153.00, I believe.

Q. How much? A. \$1,153.00.

Mr. McLeod: As far as I am concerned, your Honor, I am ready to conclude this examination. Evidently, Mr. Connors is not going to be present and, therefore, it may go off calendar now.

Mr. Moran: And the witness *are* excused?

The Referee: Yes.

Mr. MacKay: May I ask a question? Mr. Mauborgne may be able to answer a question you asked me.

Q. (By Mr. MacKay): Did you consider when the Burlingame Products Company took over the assets of the Western Products Company that it also assumed the liabilities?

(Testimony of Joseph O. Mauborgne.)

A. Without doubt, I would say so. We paid the bills that we got at that time.

Q. (By Mr. McLeod): Was there any written agreement?

A. No written agreement, just agreed between Mr. MacNeil and myself that as the bills came in we would pay if the money [50] was there to pay. Of course, we only had a small amount, \$800.00 to start with. We were short when we started out.

Q. Whose idea was it to incorporate?

A. I think we just talked it over among ourselves, Mr. MacNeil, Mr. MacKay and myself.

Mr. MacKay: If I was going to put additional funds in, I wanted additional protection.

Mr. Moran: I might add to my statement regarding the lease, that there was a provision to get an assignment and a release for Mr. MacKay.

The Referee: Thank you. That is all.

(Witness excused.)

(Concluded.) [51]

Monday, September 8, 1947—2 P.M.

ORDER TO SHOW CAUSE vs. F. W. MacKAY

Mr. Moran: Appearing on behalf of the respondent, F. W. MacKay, there is an objection in the nature of a general demurrer, that the petition does not state facts, or grounds justifying the relief sought.

Also, the affidavit of the respondent alleges:

“That he is an American citizen, of the age of

53 years or thereabouts, and by profession a geologist and mining operator. That approximately sixteen years ago he retired from professional and general business activities and since that time has devoted himself to travel and the pursuit of outdoor recreation.

“That affiant has no dependents nor any living near relatives. That he has from sources outside the State of California an income sufficient to supply his wants and that he has no motive nor incentive, nor any desire nor inclination to amass properties, to increase his income, nor to re-enter business activities of any kind, but that from time to time he has become acquainted with worthy individuals who were struggling to advance themselves under difficulties and has advanced them financial aid but with no motive of profit to himself except to recover the amount of such advances and possibly interest thereon at current commercial rates.

“That during the war period affiant became acquainted in San Francisco with one Joseph O. Mauborgne, Jr., through a common interest in breeds of dogs, and [2*] formed for him liking and regard; that said Mauborgne is in the business of running a pet shop and had knowledge of a small bird-cage manufacturing business operated by an individual who wanted to retire, and that he, Mauborgne, wished to acquire and operate the same as a side line to his store, more especially as there was a war shortage of the product, and to him

*Page numbering appearing at foot of page of original certified Transcript of Record.

affiant advanced the money required to purchase the machinery and equipment used in said business. Said transaction was made under an agreement between affiant and said Mauborgne that the latter should devote all necessary time in mechanical and managerial services to the operation of the said business, without salary or compensation other than that the profits thereof would be divided share and share alike between himself and affiant. That said purchase was made, and Mauborgne took over the equipment and operation of the said business accordingly, and continued the same in the said City of San Francisco under the trade name of Western Products Company. That bird-cages were and are important to said Mauborgne but of no interest or consequence to affiant.

“That during the early part of the year 1946 affiant decided to return for an indefinite period to the Island of Tahiti in the South Pacific, where he had resided and had interests previously to his coming by reason of the war to San Francisco, and he thereupon [3] consulted an attorney with respect to his local business affairs, and was by the latter advised that the business last referred to did not have proper legal standing inasmuch as the fictitious name thereof had never been registered as required by law.

“That upon consultation between affiant and said Mauborgne it was mutually agreed that they would form a corporation to take over and operate the said business, on the basis that the profits and emoluments thereof or whatever the same might

consist would be divided share and share alike between the two, and in pursuance of said agreement a corporation was formed, under the name Burlingame Products Company, which took over the assets and operation of the preceding business, and inasmuch as its facilities in San Francisco were inadequate moved the same to the City of Burlingame, County of San Mateo, California, in the course of which affiant made further cash advances to the said corporation, of which Mauborgne had become president and manager and who thereafter gave to it his full time and services and the use of his automobile without salary or compensation other than his agreed perspective one-half share in the profits and any issue of corporate stock which might result. That the said Mauborgne also from time to time made contributions in cash for the benefit of the said corporation, the amount of which affiant does not [4] at present recollect.

“That affiant did not become a director or officer of the said corporation, and shortly after its formation departed for the Island of Tahiti, where he remained until in or about the month of September, 1946, when he returned to San Francisco and found that the said corporation was in a state of insolvency.

“That at the first meeting of the board of directors of said corporation its attorney was requested and instructed to make application to the Corporation Commissioner of the State of California for the issuance of corporate stock, in such amounts as in his opinion were justified by the financial con-

dition of the company; that affiant is informed by said attorney and believes and therefore alleges that in the interim last mentioned no application was filed with the said Corporation Commissioner for the issuance of stock, for the reason that the removal of the corporate business from San Francisco and its re-establishment in Burlingame involved numerous complications and distractions on the part of the company's officers and that the financial and other statements required by law and regulations for a proper application to the Corporation Commissioner could not be obtained.

“That in addition to the instance hereinabove cited, on three other occasions this affiant has made financial advances to individuals whom he considered personally worthy, in order that they might individually better their condition in the community, on an agreed basis of sharing its profits and emoluments, two of which were in the ratio of equal shares and the other at a somewhat different percentage.”

And the rest consists of general and specific denials of the allegations of the petition.

The Referee: Mr. McLeod?

Mr. McLeod: If your Honor please, you will probably recall the testimony given by the various officers of Burlingame Products Company, including Mr. Mauborgne, the president and Mr. MacNeil, the secretary-treasurer. It was testified at that time that the corporation had been formed at the instigation of Mr. MacKay; that no shares of stock had been issued, and according to notes I made, the only financial investment Mauborgne had ever made in

Burlingame Products Company or the predecessor co-partnership was about \$400.00. Mr. MacKay took the lease on the place of business of the bankrupt, paid the first and last months' rent, and sometime thereafter, or after the organization of the corporation, assigned the lease to it. Neither Mauborgne nor MacNeil appeared to know just what their reward in the form of shares of stock were to be. They also, at least, Mr. MacNeil who was the secretary-treasurer pleaded almost complete ignorance about the business of the corporation, I think. Correct me, Counsel, if I exceed my recollection. [6]

Also, as I recall it, he testified he was approached by Mr. MacKay and put in the office of secretary-treasurer, presumably to watch over Mr. MacKay's interests.

The basis of this Order To Show Cause and Petition is that actually there was no corporation; that it was formed at the behest of Mr. MacKay because of his contemplated absence from the country; it was his own baby, as it were, and no shares of stock ever were issued; the corporation, actually, did not come to a fruition, as it were, and it is the contention of the Trustee that it was under the domination of Mr. MacKay; that it was his sole activity; he was the sole motivating power behind it; and your Honor has obtained summary jurisdiction over Mr. MacKay by his appearance here.

For that reason, the Trustee makes this motion for marshalling his assets to make up the difference between the assets of the estate and the amounts of the claims that have been presented in this proceeding.

The Referee: What about the objection that the Petition does not state facts or grounds to support any of the allegations?

Mr. Moran: Because the Petition is based purely upon conjectures, your Honor.

Mr. McLeod: No, I don't concede to Counsel that it is based on conjecture. It is based on the testimony of the various interested parties in this matter and also it is based upon the law, that a corporation, not having actually become active, the parties, the promoters of the corporation, actually [7] are joint-venturers.

Mr. Moran: The corporation, of course, your Honor, was duly and legally organized and that came into existence when the Secretary of State issued his Certificate to that effect. It began to function, took over an assignment of the lease, and operated a manufacturing business in its own name. The arrangement, of course, is nothing at all unusual, that one man will contribute services to an undertaking and another man will finance it, and that is exactly the case here. It was not intended that Mauborgne put up any money; however, he did, but he agreed he would give his time and Mr. MacKay advanced the money, not through any motives of personal benefit, but, as testified here, through his liking and confidence in Mauborgne and simply wanting to help him along. It is not a case where it is the matter of a one-man corporation but is strictly a matter of equities, where one man owns and is in position to claim the entire assets. The matter of the issuance of stock, whether the

stock would be in his name or anybody else's name, it would be a question of equity as to whether a single man would be able to claim and take over all the assets of the corporation. Advisedly, I say that could not be done here, under the agreement that MacKay advanced the necessary moneys and Mauborgne give his services. It was strictly a matter of salary and looking to the future compensation in profits and stock of the corporation.

Mr. McLeod: On the point of equity, your Honor, I cite [8] the case of Pepper vs. Litton, 60 Sup. Ct. 238, decided by the United States Supreme Court in 1939. The citation is 60 Sup. Ct. 238.

The Referee: I am familiar with the case.

Mr. McLeod: Are you familiar with the case?

The Referee: Yes.

Mr. McLeod: All I was going to state was, that in that decision it states that equity has disregarded at times the corporate entity, especially in an instance where it has been shown that a corporation is a stockholder's own enterprise, and in that case the Court says it will treat the corporation simply as part of the stockholder's property and consistently with the course of conduct of the stockholder. In this instance, I think, that the testimony that was developed at the two examinations held of the officers of the corporation distinctly shows that they were purely dummys, as it were, for Mr. MacKay.

Mr. Moran: What is that citation, please?

Mr. McLeod: Pepper vs. Litton, 60 Sup. Ct. 238.

The Referee: Really, what you are contending,

Mr. McLeod, is that the corporation was the alter-ego of Mr. MacKay.

Mr. McLeod: That is true. That is what we are endeavoring to contend.

The Referee: Do you think your pleading is sufficient to show that? You have an allegation in the second paragraph to the effect that said F. W. MacKay and said corporation were and are, in reality, the same. That is an allegation of fact. I think the next sentence is really a conclusion of law, it is argumentative.

Mr. McLeod: That is a conclusion. I concede that. It is based upon the facts but that is a conclusion.

The Referee: Yes. I think the objection that the Petition for said Order To Show Cause does not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, should be overruled and such is the ruling.

Now, I presume, in the absence of Mr. MacKay, we will have to set down a date for the hearing.

Mr. McLeod: Yes.

The Referee: What date can Mr. MacKay be here, Counsel?

Mr. Moran: I think almost any time. I assumed, your Honor, that on a written Petition for Order To Show Cause, the proper response was a written answer to the Petition and the appearance by Counsel, and that an oral examination would not be necessary, particularly as the respondent has been fully examined.

The Referee: Are you willing to stipulate that the matter may be considered on the testimony heretofore given?

Mr. McLeod: I think the Trustee is, your Honor, because I don't believe we would develop anything further from Mr. MacKay's examination.

The Referee: Are you?

Mr. Moran: Yes, your Honor. [10]

The Referee: Very well, then. The matter may be submitted. If Counsel has any law, either one of you, that you want to give to the Court, other than what Mr. McLeod has already given me, I would be glad to hear from you.

Mr. Moran: I would like to examine this case, your Honor, and I would like five days to file points and authorities.

The Referee: Five, five and three.

Mr. Moran: Yes.

Mr. McLeod: That is agreeable.

(Submitted 5/5/3.) [11]

[Endorsed]: No. 11937. United States Circuit Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of Burlingame Products Co., Inc., Bankrupt, Appellant, vs. F. W. MacKay, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,937

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the
Estate of Burlingame Products Co.,
Inc., Bankrupt,

Appellant,

VS.

F. W. MACKAY,

Appellee.

APPELLANT'S OPENING BRIEF.

JAMES M. CONNERS,

444 Market Street, San Francisco, California,

STANLEY M. MCLEOD,

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Attorneys for Appellant.

FILED

JUL 28 1948

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	3
(a) Nature of the case	3
(b) Issues presented	5
Specification of errors	7
Argument	8
I.	
The District Court erred in reversing the referee's order on petition that appellee turn over his assets to appellant trustee	8
II.	
The referee had summary jurisdiction to make his order and appellee's challenge to such jurisdiction came too late	10
III.	
The facts support the finding of the referee that appellee and the bankrupt are one and the same	16
IV.	
The referee's findings of fact and conclusions of law should be sustained	19
V.	
Insolvency of appellee not a prerequisite to issuance of turnover order	24
Conclusion	26

Table of Authorities Cited

Cases	Page
Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195	12
Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310	18
Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641.....	17
Honeyman v. Hughes (C.C.A. 9th), 156 F. (2d) 27, 67 S. Ct. 99	13
In re Bergstrom (C.C.A. 8th), 1 F. (2d) 288	11
In re Dungeness Timber Co., Inc. (D.C. Wash.), 50 F. Supp. 370	15
In re Foley (C.C.A. 9th), 4 F. (2d) 154	25
In re Horgan (C.C.A. 1st), 158 F. 774	11
In re Loring (D.C. Mass.), 30 F. Supp. 758.....	14
In re Meyers (C.C.A., N.Y.), 98 Fed. 975	25
In re Pearlman (C.C.A. 2nd), 16 F. (2d) 20	11
In re Pinsky-Lapin & Co., Inc. (C.C.A. 2nd), 98 F. (2d) 776	15
In re White Satin Mills (D.C.), 25 F. 313	11
Louisville Trust Co. v. Cominger, 184 U. S. 18, 46 L. Ed. 413, 22 S. Ct. 293	11
McDonald v. First National Bank of Attleboro (C.C.A. 1st), 70 F. (2d) 69, 25 A.B.R. (N.S.) 193.....	22
Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673.....	17
Morris Plan Industrial Bank v. Henderson (C.C.A. 2nd), 131 F. (2d) 975, 51 A.B.R. (N.S.) 79	22
Pepper v. Litton, 60 S. Ct. 238, 308 U. S. 311, 84 L. Ed. 281, 41 A.B.R. (N.S.) 279	19
Reich v. Industrial Com'r of New York (C.C.A. 2nd), 145 F. (2d) 759, 57 A.B.R. (N.S.) 633	23
Rhode v. Durst (C.C.A. 9th), 28 F. (2d) 980	14
Sweet v. Watson's Nursery, 33 C. A. (2d) 699, 92 P. (2d) 812	17

	Page
Watson v. Commonwealth Ins. Co. of N. Y., 8 C. (2d) 61, 63 P. (2d) 295	17
Wenban Estate v. Hewlett, 193 Cal. 675, 227 Pac. 723....	18

Statutes

Bankruptcy Act, Title 11, U.S.C., Chapter 4, Sections 47 and 48	2
Judicial Code, Title 28, U.S.C., Chapter 6, Section 225(c) ..	2
11 USC., Chapter 5, Section 67(c)	2

Texts

6a Cal. Jur. 75	17
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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the
Estate of Burlingame Products Co.,
Inc., Bankrupt,

Appellant,

VS.

F. W. MACKAY,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an Order of the District Court of the United States for the Northern District of California. The said Order is set forth in the Transcript of Record herein. (Tr. p. 23.)

Appellant, John O. England, is Trustee of the Estate of Burlingame Products Co., Inc., a corporation, Bankrupt, a proceeding pending before said District Court. Order Approving the Bond of Trustee was made on April 22, 1947. (Tr. pp. 3-4.)

The action arises out of the Petition for Order to Show Cause of Appellant Trustee (Tr. pp. 4-7) and Order to Show Cause of Referee in Bankruptcy Bur-

ton J. Wyman (Tr. p. 8) upon Appellee, F. W. MacKay, to appear and show cause why an Order should not be made and entered requiring him to turn over to the Appellant Trustee all of his assets, or to pay to Appellant a sum of money sufficient with the moneys then in the possession of the Trustee, to satisfy proper expenses of administration of said bankruptcy proceeding and all of the claims of creditors filed therein.

Said Petition was filed, and said Order to Show Cause issued, on July 30, 1947. Appellee filed his answer or response thereto (Tr. p. 9) on September 8, 1947, on which date the Referee in Bankruptcy duly and regularly held a hearing and, the matter having been submitted, made and filed his Order granting the Petition of the Appellant Trustee on September 26, 1947. (Tr. pp. 15-19.)

On October 20, 1947, pursuant to the provisions of Title 11, Chapter 5, Section 67(c), U.S.C., Appellee filed his Petition for Review of the Order of the Referee in Bankruptcy, dated September 26, 1947. (Tr. pp. 19-23.)

The Petition was thereafter heard before the District Court and on January 30, 1948, said Court made its Order setting aside the Order of the Bankruptcy Referee. (Tr. pp. 23-27.) Under authority of the Judicial Code, Title 28, U.S.C., Chapter 6, Section 225(c) and the Bankruptcy Act, Title 11, U.S.C., Chapter 4, Sections 47 and 48, appeal was taken to this Court to review the said Order of the Court below. Notice of Appeal was filed on February 28, 1948 (Tr. pp. 27-28) and on April 8, 1948, the District Court

extended the time for filing the Record on Appeal to May 18, 1948. (Tr. p. 28.) On May 18, 1948, the time was further extended to May 28, 1948 (Tr. p. 23) and this appeal and the Transcript of Record were filed and docketed in this Court on May 24, 1948.

STATEMENT OF THE CASE.

(a) Nature of the Case.

On January 22, 1947, certain creditors of the Burlingame Products Co., Inc., a corporation, the bankrupt herein, filed a Petition that it be adjudged a bankrupt, the alleged act of bankruptcy being the execution of an Assignment for the benefit of its creditors on November 5, 1946, to one John Costello of all of its assets, property and effects. Order of Adjudication of the bankrupt was entered by the District Court on February 24, 1947. (Tr. pp. 2-3.)

Thereafter, Appellant was duly appointed Trustee of said bankrupt estate and caused an examination to be had, under Section 21-a of the Bankruptcy Act, of the Appellee, F. W. MacKay, and certain officers of the bankrupt corporation. (Tr. pp. 35-88.)

From such examination it was established that the bankrupt corporation was organized under the laws of the State of California on March 16, 1946. (Tr. pp. 42-43.) No Application was ever filed with the California Commissioner of Corporations for a Permit to issue shares of stock of said corporation and no shares of stock were ever issued.

The corporation was organized at the suggestion of Appellee (Tr. p. 52) for the purpose of taking over all of the assets of Western Products Company which had been turned over to Appellee in return for his cash investments therein. (Tr. pp. 67 and 72-73.) Western Products Company was in the same line of business, to-wit, the manufacture of birdcages and bird supplies. (Tr. p. 51.) Appellee had financed the establishment of Western Products Company (Tr. p. 65) which was thereafter operated on a profit sharing arrangement (Tr. pp. 65-66) by Joseph Mauborgne, later President of the bankrupt, until the organization of the bankrupt corporation. (Tr. pp. 66-68.) There was merely a change of name of the business from Western Products Company to that of the bankrupt corporation, and the existing liabilities of the former were paid with funds of the bankrupt. (Tr. p. 83.) Mauborgne testified that he ran Western Products Company with the "financial backing" of Appellee. (Tr. p. 49.) The latter paid for electric wiring required by the bankrupt in its place of business (Tr. p. 42) and made various suggestions regarding the plant and equipment of the bankrupt. (Tr. p. 63.)

Neither Mauborgne, the President of the bankrupt, nor MacNeil, the Secretary-Treasurer thereof, knew how many shares of stock they were to receive or the number which would be allocated to them. (Tr. pp. 53 and 57-58.) MacNeil invested no money (Tr. p. 38), but was asked by Appellee to act as Secretary-Treasurer to "look after the money part of the busi-

ness'' (Tr. p. 39) during the absence of Appellee from this country.

Mauborgne testified that he had no financial interest in the corporation. (Tr. pp. 49 and 54.) Mauborgne further testified that he did not know who had owned Western Products Company, predecessor to the bankrupt (Tr. p. 50); that Appellee was not his employer (Tr. p. 51) and that he was not a copartner with Appellee. (Tr. p. 60.) All moneys required for the operation of the bankrupt other than those derived from the sale of the products of the corporation were contributed by Appellee (Tr. pp. 54-55), and the latter procured in his name the lease of the business premises of the bankrupt, paid in advance the first and last month's rental thereon and he later transferred the lease to the bankrupt. (Tr. pp. 80-81.) It was Appellee who had located the business premises for the bankrupt. (Tr. p. 58.)

(b) Issues Presented.

On the basis of the foregoing facts and testimony the Referee found that the bankrupt corporation was organized in March, 1946 (Tr. p. 16) and that at no time has any Permit to issue shares of capital stock thereof to the officers and/or directors of said corporation or anyone else ever been issued. (Tr. p. 17.) The Referee further found that the corporation was organized at the instigation of Appellee and for his personal benefit, and not otherwise (Tr. p. 17), and that said corporation now has and at all times since its organization in truth has been Appellee who, as an

individual, disregarded the substance and/or form of said corporation and treated the affairs of said corporation as his own and as a part of his own enterprise. (Tr. p. 17.) The Referee also found that the assets of the bankrupt, as such alone, are insufficient to satisfy the claims of creditors of the bankrupt corporation which, under the Bankruptcy Act, are and/or will be entitled to allowance in the bankruptcy proceeding (Tr. p. 17) and that all debts contracted in the name of the corporation in truth were contracted by, in behalf of and/or for the ultimate benefit of Appellee as an individual and not otherwise, and that Appellee, as such individual, and said bankrupt are debtors, and each of them, is a debtor, of the creditors, who, of record in said bankruptcy proceeding, now appear or who later may appear as creditors only of said bankrupt, having allowed or allowable claims in the bankruptcy proceeding. (Tr. pp. 17-18.)

As a Conclusion of Law, the Referee thereupon held that Appellant Trustee is entitled to have turned over to the estate of the bankrupt all assets of Appellee, as an individual, or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the assets of the bankrupt) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in said bankruptcy proceeding. (Tr. p. 18.)

Based upon the foregoing statement of the nature of the case and summary of facts, the issues presented are:

1. Whether the bankrupt corporation was the *alter ego* of Appellee and the instrumentality through which, for convenience, he transacted his business and that, therefore, the corporate entity may be disregarded and Appellee held to be liable, individually, for the debts contracted in the name of the bankrupt.

2. Whether the District Court erred in holding that the Referee had acted, and was, without jurisdiction to make his Order of September 26, 1947, directing Appellee to turn over his assets to Appellant as Trustee.

SPECIFICATION OF ERRORS.

1. The District Court erred in reversing the Referee's Order on Petition that Appellee turn over his assets.

2. The District Court erred in holding that the Referee had acted, and was, without jurisdiction to make his Order directing Appellee to turn over his assets to Appellant Trustee.

3. The District Court erred in holding that Trustee's Petition for an Order to Show Cause against said Appellee did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever.

4. That the District Court erred in disregarding the mandatory provisions of Supreme Court General Order in Bankruptcy No. 47 requiring the Judge of the District Court to accept the Findings of Fact of the Referee unless clearly erroneous, in that said Findings of Fact are supported by the evidence.

ARGUMENT.

In presenting his argument Appellant believes that all the facts essential thereto have been summarized with appropriate references to the Transcript of Record in his statement of the case and therefore, in the interest of brevity, will rely upon such statement of facts except where further detail requires specific references.

I.**THE DISTRICT COURT ERRED IN REVERSING THE REFEREE'S ORDER ON PETITION THAT APPELLEE TURN OVER HIS ASSETS TO APPELLANT TRUSTEE.**

The District Court in its Order (Tr. pp. 23-27) reversing the Order of the Referee (Tr. pp. 15-18) based such reversal upon two grounds, namely, that (1) the Referee had acted without jurisdiction, and (2) that in not sustaining the contention of Appellee that the Petition of Appellant did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, the Referee fell into error.

As to the first point, Appellant treats this more fully in Paragraph II of this Argument and cites therein numerous authorities of this and other courts which hold that the question of summary jurisdiction of the Bankruptcy Court can only be raised prior to the entry of a final order by a referee. The Transcript of Record discloses no such objection by Appellee. Appellee did not object to the jurisdiction of the Referee until long after his Order had become

final. For this reason, it is respectfully urged that the District Court erred in finding that the Referee had acted without jurisdiction.

The District Court further held that Appellant's Petition did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed. In his Response to the Order to Show Cause (Tr. p. 9) Appellee made such contention, which was overruled by the Referee. (Tr. p. 96.) As appears therein, it was the sole objection raised by Appellee.

This objection of Appellee may be likened to an attempt by him to demur to the Petition on the ground that it did not state facts sufficient to justify the relief sought. In fact, counsel for Appellee on his appearance in opposition to the Order to Show Cause stated that "there is an objection in the nature of a general demurrer, that the petition does not state facts, or grounds justifying the relief sought." (Tr. p. 88.) Demurrers have, of course, been abolished in the District Courts. (Rule 7, Rules of Civil Procedure for the District Courts of the United States.) And Supreme Court General Order in Bankruptcy No. XXXVII provides that the Rules of Civil Procedure for the District Court shall, in so far as they are not inconsistent with the Bankruptcy Act or with the Supreme Court General Orders in Bankruptcy, be followed as nearly as may be.

Aside from this, however, Appellant contends that the Referee did not err in overruling such objection. The Petition set forth that from the examination of Appellee and the bankrupt's officers, it appeared, and

Appellant so alleged the fact to be, that the bankrupt corporation was organized; that no Permit to issue shares of capital stock thereof had ever been obtained from the California Corporation Commissioner; that no shares of capital stock had ever been issued to any of the officers or directors of the bankrupt or to anyone else; that the bankrupt corporation was organized at the instigation of Appellee and that Appellee and the bankrupt corporation were and are in reality the same. Such allegations, it is respectfully urged, warranted the Referee in overruling the objection of Appellee to the sufficiency of Appellant's Petition.

II.

THE REFEREE HAD SUMMARY JURISDICTION TO MAKE HIS ORDER AND APPELLEE'S CHALLENGE TO SUCH JURISDICTION CAME TOO LATE.

In his Petition to the District Court for Review of the Referee's Order, Appellee did not challenge the summary jurisdiction of the Referee to make such Order, and the Transcript of Record discloses no such challenge before the Referee. *He first raised the question of jurisdiction* in his closing brief filed with the District Court. Appellant contends that this challenge came too late and that the District Court erred in holding the Referee acted without jurisdiction. (Tr. p. 27.)

The decisions of a Referee are not reviewable until embodied in an Order, and a final Order or finding by a Referee is a prerequisite to such Review.

To this effect is the decision of *In re Prindible*, 115 F. (2d) 21 (C.C.A. Pa.), where the Court said:

“It is of course elementary that, save for excepted instances statutorily prescribed, an appeal lies only from a final order, judgment, or decree. *Zoline, Federal Appellate Jurisdiction & Procedure*, 3rd ed., Sec. 35. And, to be final, the order, judgment, or decree must be complete as to all parties and as to the whole subject matter therein involved. *Collins v. Miller*, 252 U. S. 364, 64 L. Ed. 616, 40 S. Ct. 347; *Wuerpel v. Canal-Louisiana Bank & T. Co.* (5 Cir.), 231 F. 934, 36 A.B.R. 802. This requirement applies equally to actions taken by a referee in bankruptcy. His final order or finding is a prerequisite to a petition for court review. *Amendatory Act of 1938*, Sec. 2, subd. a, 11 U.S.C.A. Sec. 11, subd. a, also Sec. 39, subd. c, 11 U.S.C.A., Sec. 67, subd. c.”

Also, it was said in *In re Pearlman*, 16 F. (2d) 20 (2 Cir.):

“* * * the occasion seems to us apt to restate the practice applicable to petitions for review of referees’ orders. The proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.”

It has been held many times that adverse claimants may challenge the summary jurisdiction of the Bankruptcy Court at any time prior to the entry of a *final order* by a referee.

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 22 S. Ct. 293;

In re Bergstrom, 1 F. (2d) 288 (C.C.A. 8th);

In re Horgan, 158 F. 774 (C.C.A. 1st);

In re White Satin Mills, 25 F. 313 (D.C.).

The leading case upon this point appears to be *Cline v. Kaplan*, 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195. This was a turnover proceeding brought by a Trustee before the Referee to recover certain real and personal property. The defendants, who were later conceded to be adverse claimants, answered on the merits and participated in the hearings, but before any order was entered, interposed first an oral and later a written motion challenging jurisdiction. The Appellate Court admitted the well settled proposition that a jurisdictional defense in a summary action embraces merely a procedural right **which may be waived** by failure to raise an appropriate objection in due time. The Court held, however, that the defendants, by making an express objection before a final Order was entered by the Referee, had done so in time, and that their prior conduct did not constitute an acquiescence to summary jurisdiction. This conclusion was supported by the Supreme Court, which said:

“Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made a formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. (*Louisville Trust Co. v. Comingor, supra.*) In the Comingor Case although the claimant ‘participated in the proceedings before the referee, he had pleaded his claims in the outset and he made his formal protest to the exercise of jurisdiction before the final order was entered. Id. 184 U.S. at 26, 46 L. Ed. 416, 22 S. Ct. 293, 7 Am. B. R. 421. This, it was held, negatived

consent and thereby the right to proceed summarily. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary proceedings. * * * The established practice based on the criteria of the Comingor Case was thus entirely satisfied. * * *"

A decision of this Circuit, in which a Writ of Certiorari was denied by the Supreme Court, follows this rule:

"If an adverse claimant is unwilling to submit to an adjudication of his claim in a summary way there is no good reason why he should not be required explicitly to inform the referee of his objection. Compare *Cline v. Kaplan*, supra; *Hall v. Goggin*, 9 Cir., 148 F. 2d 774; *In re Realty Associates Securities Corp.*, 2 Cir., 98 F. 2d, 722. He will not be permitted to speculate on the outcome of the proceeding, and then, if he loses the decision, for the first time understandably protest the procedure."

Honeyman v. Hughes, 9 Cir., 156 F. (2d) 27
(Writ of Certiorari denied Oct. 14, 1946, 67
S. Ct. 99).

The Appellee did not raise the question of whether the Referee had jurisdiction prior to the entry by the Referee of his final Order in this proceeding.

Other cases in point are the following:

"Substantially the only contention made by appellant is that the bankruptcy court was without jurisdiction to adjudicate the controversy in a summary proceeding. But, if the right to object to such jurisdiction ever existed (a point we do

not decide), appellant waived it. Where, as in such a case, the question is one of personal privilege, only, a defendant cannot appear generally, and, after submitting to a trial of the controversy upon its merits, be heard to object to the jurisdiction."

Rhode v. Durst, 9 Cir., 28 F. (2d) 980.

"It is suggested, in the trustee's brief, that question may be raised as to the jurisdiction of the referee to order in summary proceeding the payment to the trustee of an alleged preference. The record is barren of any intimation that Dutchland (petitioner claimant) objected to the proceeding before the referee, and it is now too late to raise that question of jurisdiction. *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 52 S. Ct. 505, 75 L. Ed. 1093."

In re Loring (D.C. Mass.), 30 F. Supp. 758.

"When the parties appeared before this court for argument for the first time said attorneys asserted that neither this court nor the referee had or have any jurisdiction of the subject matter of the action. * * * When they appeared in the proceeding before the referee, made proof and urged the arguments they did, such, under the authorities, constituted a consent in law to the proceedings against them. Under the circumstances the tardy objection above-mentioned can be of no effective avail. Among the host of decisions the following establish the lack of merit in such belated contention of said attorneys: *Rhode v. Durst*, 9 Cir., 28 F. 2nd 980; *In re Murray*, 7 Cir., 92 F. 2nd 612; *In re Ackermann*, 6 Cir., 88 F. (2nd) 971; *In re West Produce Corporation*,

D.C., 33 F. Supp. 991; *Bachman v. McCluer*, 8 Cir., 63 F. 2nd 580. It must, therefore, be held that the court now has, and that the referee did have, jurisdiction.”

In re Dungeness Timber Co., Inc., D.C. Wash., 50 F. Supp. 370-371.

“The first point is met by the fact that the respondents raised no timely objection to the summary proceeding. They answered the trustee’s petition and went to trial without contending that the referee lacked power and that only a plenary suit would lie. Such a submission to the jurisdiction was sufficient even though there was no formal consent. *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269, 271, 52 S. Ct. 507, 508, 76 L. Ed. 1096, affirming 8 Cir., 53 F. (2nd) 27, 35; *In re Hopkins*, 2 Cir., 229 F. 378, 380. Objection was first made after the referee had issued his ‘turnover order’ and at the time when the proceeding was on review before the district judge. This was too late.”

In re Pinsky-Lapin & Co., Inc., 2 Cir., 98 F. (2d) 776.

Under the circumstances existent herein, to-wit: failure of the Appellee to make timely objection to the summary jurisdiction of the Bankruptcy Referee, and upon the basis of the rule laid down by the above-cited decisions, it would conclusively appear: (1) that the Referee did have jurisdiction to make his Order directing Appellee to turn over his assets to Appellant Trustee, and (2) that the District Court erred in holding the Referee lacked such jurisdiction.

III.

THE FACTS SUPPORT THE FINDING OF THE REFEREE THAT APPELLEE AND THE BANKRUPT ARE ONE AND THE SAME.

It will be noted that the District Court in its Order on Petition for Review of Referee's Order (Tr. pp. 23-27) did not choose to decide whether the facts developed in the bankruptcy proceeding justified a finding that the corporation was organized at the direction of Appellee for his personal benefit and that Appellee and the bankrupt were and are in reality the same and that Appellee is equally liable with the bankrupt corporation for debts contracted in its name.

Appellant believes that the facts surrounding the organization of the bankrupt corporation clearly support the Findings of the Referee that the corporation and Appellee were in truth one and the same. Further, that from this finding it may be said that a Turnover Order directed against Appellee is, in fact, a Turnover Order directed against the bankrupt. Appellee is in the same position as though he had been doing business as an individual under the fictitious name of Burlingame Products Co. He also has never asserted that he does not have assets or the moneys required to satisfy the Order of the Referee, and the necessary basis for the Turnover Order against him therefore exists.

It is the law in California as elsewhere that, although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud,

protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical. Vol. 6a *Cal. Jur.* 75; *Erkenbrecher v. Grant*, 187 Cal. 7, 200 Pac. 641; *Minifie v. Rowley*, 187 Cal. 481, 202 Pac. 673.

There are many decisions in support of such rule. Among them are *Sweet v. Watson's Nursery*, 33 C.A. (2d) 699, 92 P. (2d) 812, in which the Court declared:

“The rule is clear that where a corporation is merely the business conduit of an individual or partners, the courts will look through the corporation to the individual. *Wenban Estate Inc. v. Hewlett*, 193 Cal. 675, 695, 227 P. 723; *Continental Securities etc. Co. v. Rawson*, 208 Cal. 228, 238, 280 P. 954. When a corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates whether the corporation be deemed a ‘one-man’ corporation, or as here claimed, a ‘two-man’ corporation, the rule is the same. (Citing cases.)”

and *Watson v. Commonwealth Ins. Co. of N. Y.*, 8 C. (2d) 61, 63 P. (2d) 295, where it was said:

“There was no error in reforming the contract to impose an individual obligation upon the plaintiff since this is clearly an appropriate case for the recognition of the acts of a corporation as in reality those of individuals. The two requirements are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice. On the second score it is sufficient

that it appear that recognition of the acts as those of a corporation only will produce inequitable results.”

As said in *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310:

“While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation * * * yet it is equally well settled courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms.”

A leading case in California is *Wenban Estate v. Hewlett*, 193 Cal. 675, 695, 227 Pac. 723. In this decision appears the following language:

“While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

“Accordingly, it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital

stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation.”

In the present proceeding it must be remembered that no shares of stock of the bankrupt have been issued, there are no stockholders thereof in existence, and the assets of the bankrupt were, in Appellee’s own words (Tr. p. 73), “turned over” to him for the money he had invested in the predecessor business of Western Products Company.

A federal court sitting in bankruptcy has full equity powers and is vested with authority to follow the general doctrine above set forth (*Pepper v. Litton*, 60 S. Ct. 238, 308 U.S. 311, 84 L. Ed. 281, 41 A.B.R. (N.S.) 279), and, Appellant submits, even if no shares of stock have been issued.

IV.

THE REFEREE’S FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD BE SUSTAINED.

As heretofore stated, the District Court did not determine that the Referee had erred in finding, based upon the facts herein, that the bankrupt and Appellee were one and the same and that the debts of the corporation were the debts of Appellee individually. But if it be assumed that such was its intention, Appel-

lant urges that this was error in that it disregarded the mandatory provisions of Supreme Court General Order in Bankruptcy No. XLVII, which requires that:

“Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous.”

It is to be noted that in the Order of the District Court (Tr. pp. 23-27) the only mention of the Findings of Fact of the Bankruptcy Referee (Tr. pp. 16-18) is found in lines 24 to 28 of page 25 of the Transcript of Record, and the language of the Court immediately following its only mention of the Findings of Fact of the Referee clearly shows the District Court confused the Petition upon which the Order of Adjudication was entered with the Petition of the Trustee for the Order to Show Cause against the Appellee MacKay.

The District Court did not predicate its decision reversing the Order of the Referee on erroneous Findings of Fact but solely on his lack of jurisdiction and on the sole contention in the Petition of Appellee that the Petition of the Appellant Trustee failed to state facts or grounds sufficient to support the relief sought by the Bankruptcy Trustee. Heretofore, in the within Brief, the attention of this Court has been respectfully directed to the Response of Appellee (Tr. p. 9) to the Order to Show Cause, and particularly attention is called to the allegations in paragraph one of

said Response. These allegations are in the nature of a demurrer to the Petition of said Trustee and in no way constitute an objection to summary jurisdiction of the Bankruptcy Referee; in fact, counsel for MacKay has described the above mentioned Response to the Order to Show Cause of the Referee dated July 30, 1947 (Tr. p. 8), as a Demurrer, and the attention of this Court is respectfully directed to the statement of Mr. Moran, counsel for MacKay, appearing on page 88 of the Transcript of the Record, lines 24 to 28.

The Appellant respectfully submits that there is no error in the Findings of Fact of the Referee and that the mandatory provisions of Supreme Court General Order XLVII required the District Court to accept all of the Findings of Fact. The evidence adduced at the hearing before the Referee and discussed in detail heretofore in the within Brief, clearly proves that Appellee MacKay disregarded the substance and form of the bankrupt corporation and treated its affairs as his own and as a part of his own enterprise. The evidence clearly supports the Findings of Fact and Conclusions of Law and Order of the Referee in Bankruptcy, and the District Court has failed to show in its Order reversing the Referee any error in the Findings of Fact of the Referee.

Unless it clearly appears that there was error or mistake on the part of the Referee, his Findings should not be set aside. This principle of law, in connection with the bankruptcy proceedings, is to be found in numerous decisions of the Circuit Courts

and in *McDonald v. First National Bank of Attleboro*, (1 C.C.A.), 70 F. (2d) 69, 25 A.B.R. (N.S.) 193, the Circuit Court said, on page 71, in reversing an Order of the District Court overruling a decision of a Referee in Bankruptcy:

“A referee’s findings ‘have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part.’ *Maxey, J., Southern Pine Company v. Savannah Trust Company*, 141 F. 802, 805 (C.C.A. 5). See, too, *Ohio Valley Bank Company v. Mack*, 163 F. 155, 24 L.R.A. (N.S.) 184 (C.C.A. 6); *In re Swift* (D.C.), 118 F. 348. Upon a careful examination of the record, we are unable to agree with the District Judge. The critical findings of the referee do not appear to us to be clearly wrong.”

In *Morris Plan Industrial Bank v. Henderson* (2 C.C.A.), 131 F. (2d) 975, 51 A.B.R. (N.S.) 79, Judge Learned Hand, speaking for the Court, on page 977, said:

“* * * and the added weight to be attached to a referee’s finding, or to a judge’s (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee’s conclusion ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the judge’s as indeed it does ours; *In re Kearney*, 2 Cir., 116 F. (2d) 899; but *we have again and again held that except in plain cases he should accept the referee’s*

findings. In re Slocum, 2 Cir., 22 F. (2d) 282; In re Gondon & Gelberg, 2 Cir., 69 F. (2d) 81; In re Goldner-Siegel Corporation, 2 Cir., 71 F. (2d) 152; In re Wisun & Golub, Inc., 2 Cir., 84 F. (2d) 1; In re Patrizzo, 2 Cir., 105 F. (2d) 142; In re Connecticut Co., 2 Cir., 107 F. (2d) 734. We therefore hold that the question is the same in this court as it was in the district court.

That being true, *we cannot see any adequate reason for refusing to accept the referee's finding upon the first objection.*" (Italics ours.)

The Circuit Court, in the above decision from which the excerpt is quoted, also reversed the District Court Order overruling the decision of the Referee in Bankruptcy. The Second Circuit again held, in the case of *Reich v. Industrial Com'r of New York* (2 C.C.A.), 145 F. (2d) 759, 57 A.B.R. (N.S.) 633, that it was error for a District Court to reverse a Referee in Bankruptcy when the decision of the latter was based upon substantial evidence adduced at the hearing before the Referee. On page 761 Judge Augustus N. Hand, speaking for the Court, said:

"If the finding by the referee that the salaries were conditional upon earnings and were in effect only payable out of them was founded on substantial evidence, as we think it was, the District Court was not justified in disregarding his conclusions."

The Trustee, in the pending matter, respectfully submits that there is no error in the Findings of Fact of the Referee in Bankruptcy. The provisions of Su-

preme Court General Order No. XLVII are mandatory upon the District Court requiring the Judge thereof to accept said Findings of Fact. In the decision of the District Court no error was mentioned by it in connection with these Findings of Fact and the Court plainly erred in reversing the Order of the Referee in Bankruptcy on which the Findings of Fact and Conclusions of Law were predicated.

V.

INSOLVENCY OF APPELLEE NOT A PREREQUISITE TO ISSUANCE OF TURNOVER ORDER.

In its opinion (Tr. p. 26) the District Court held that the Referee had not found Appellee to be an insolvent, and that if the Order of the Referee should be upheld, the result would be an unlawful preference of creditors by the Bankruptcy Court in that debts of Appellee, contracted in his own name and not in the name of the corporation, and outstanding and unpaid, would not be taken into consideration in the distribution of all of his assets.

It is respectfully argued that this result would not at all be certain. A Turnover Order directed against a person other than a bankrupt is not uncommon, and as a parallel to the present facts and circumstances Appellant calls attention to the well sanctioned practice of bringing in individual estates of solvent partners for administration by the Bankruptcy Court where the firm alone is adjudicated a bankrupt.

In referring to this latter practice, it was said in *In re Meyers*, 98 Fed. 975 (C.C.A., N.Y.):

“We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual members as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication.”

Were Appellee an insolvent (a fact not in evidence as Appellee has never asserted that he did not have the means with which to comply with the Order of the Referee), the Referee could require or permit Appellee's individual creditors to present their claims to the Court for *pro rata* participation on an *equal basis* with creditors of the bankrupt corporation, in the proceeds of any assets of Appellee turned over to Appellant in response to the Order of the Referee.

Such procedure is exactly the same as consolidating the estates of two bankrupts for purposes of administration, where their interests are so linked or commingled as to require or recommend such action. *In re Foley*, 9 Cir., 4 F. (2d) 154.

CONCLUSION.

It is respectfully urged that the Order of the District Court setting aside the Order of the Referee in Bankruptcy directing Appellee to turn over to Appellant his sole individual assets be reversed.

Dated, San Francisco, California,
July 26, 1948.

Respectfully submitted,

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STANLEY M. McLEOD,

Attorneys for Appellant.

No. 11,937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the
Estate of Burlingame Products Co.,
Inc., Bankrupt,

Appellant,

VS.

F. W. MACKEY,

Appellee.

BRIEF FOR APPELLEE.

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AUG 27 1948

THOMAS P. O'SHEA

Subject Index

	Page
Appellant's statement of the case is controverted	1
The issues should be considered in reverse of the order set up by appellants	5
A referee in bankruptcy is totally without jurisdiction to make a "turnover order" of assets not belonging to the bankrupt, but privately owned by a third party	6
Objection to the referee's jurisdiction to make the turnover order sought was made properly and in limine	9
Of jurisdiction—its distinctions, and of the modes and timeliness of interposing objections to its exercise	11
The corporate entity of the bankrupt, Burlingame Products Company, cannot be disregarded and appellee MacKay held liable for its debts	13
A corporation, upon its statutory organization, becomes a legal entity, distinct from its promoters or subsequent stockholders	13
Conclusion	16

Table of Authorities Cited

Cases	Pages
Burnet v. Clark, 287 U. S. 410, 77 L. Ed. 397.....	14
Capron v. Van Noorden, 2 Cranch (U.S.) 126, 2 L. Ed. 229	12
Chicago First Nat. Bk. v. Chicago Title etc. Co., 198 U. S. 230, 49 L. Ed. 1051	12
Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931	12
Elenkrieg v. Siebrecht, 144 N. E. 519	16
Gledhill v. Fisher & Co. (Mich.), 262 N. W. 371.....	15
Honeyman v. Hughes, 156 Fed 2d 27	11
In re Adler, 170 Fed. 634	7
In re Rosser, 101 Fed. 562	7
In re Zappala, 44 Fed. Supp. 353	7
Maggio v. Zeitz as Trustee in Bankruptcy, 92 U. S. Adv. Ops. 376	9
New Colonial Ice Co. v. Helvering, 292 U. S. 435, 78 L. Ed. 1348	14
Ross v. Commissioner, 129 Fed. 2d 310.....	14
U. S. v. New York, etc. S.S. Co., 216 Fed. 61.....	12

Texts

7 Corpus Juris, par. 229, p. 137	6
15 C. J., 826, par. 144	12
15 C. J., 847	12
15 C. J., 849	12
42 C. J., 489	10

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Appellant,

vs.

F. W. MACKEY,

Appellee.

BRIEF FOR APPELLEE.

APPELLANT'S STATEMENT OF THE CASE IS CONTROVERTED:

Controverted, that is to say, as to any assumption that it consecutively, fully or fairly presents the facts brought out in the testimony before the referee (Tr. pp. 35-97). As what we claim to be an impartial summary of the same, we herewith reproduce substantially the affidavit of Appellee MacKay on order to show cause (Tr. pp. 10-14), in the form taken by the same in his statement of facts on petition for review before the District Court:

Petitioner F. W. MacKay is an American citizen, of the age of 53 years or thereabouts, and by profes-

sion a geologist and mining operator. Approximately sixteen years ago he retired from professional and general business activities and since that time has devoted himself to travel and the pursuit of outdoor recreation.

Petitioner has no dependents nor any living near relatives. He has from sources outside the State of California an income sufficient to supply his wants and he has no motive nor incentive, nor any desire nor inclination to amass properties, to increase his income, nor to re-enter business activities of any kind, but from time to time he has become acquainted with worthy individuals who were struggling to advance themselves under difficulties and has advanced them financial aid but with no motive of profit to himself except to recover the amount of such advances and possibly interest thereon at current commercial rates.

During the war period petitioner became acquainted in San Francisco with one Joseph O. Mauborgne, Jr., through a common interest in breeds of dogs, and formed for him liking and regard; said Mauborgne is in the business of running a pet shop and had knowledge of a small bird-cage manufacturing business operated by an individual who wanted to retire, and he, Mauborgne, wished to acquire and operate the same as a side line to his store, more especially as there was a war shortage of the product, and to him petitioner advanced the money required to purchase the machinery and equipment used in said business. Said transaction was made under an agreement between petitioner and said Mauborgne that the latter

should devote all necessary time in mechanical and managerial services to the operation of the said business, without salary or compensation other than that the profits thereof would be divided share and share alike between himself and petitioner. Said purchase was made, and Mauborgne took over the equipment and operation of the said business accordingly, and continued the same in the said City of San Francisco under the trade name of Western Products Company. Bird-cages were and are important to said Mauborgne but of no interest or consequence to petitioner.

During the early part of the year 1946 petitioner decided to return for an indefinite period to the Island of Tahiti in the South Pacific, where he had resided and had interests previously to his coming by reason of the war to San Francisco, and he thereupon consulted an attorney with respect to his local business affairs, and was by the latter advised that the business last referred to did not have proper legal standing inasmuch as the fictitious name thereof had never been registered as required by law.

Upon consultation between petitioner and said Mauborgne it was mutually agreed that they would form a corporation to take over and operate the said business, on the basis that the profits and emoluments thereof of whatever the same might consist would be divided share and share alike between the two, and in pursuance of said agreement a corporation was formed, under the name Burlingame Products Company, which took over the assets and operation of the preceding business, and inasmuch as its facilities in

San Francisco were inadequate—there had also been a fire in the San Francisco premises and condemnation by the Fire Department—moved the same to the City of Burlingame, County of San Mateo, California, in the course of which petitioner made further cash advances to the said corporation, of which Mauborgne had become president and manager and who thereafter gave to it his full time and services and the use of his automobile without salary or compensation other than his agreed prospective one-half share in the profits and any issue of corporate stock which might result. The said Mauborgne also from time to time made contributions in cash for the benefit of said corporation, the amount of which petitioner does not at present recollect.

Petitioner did not become a director or officer of the said corporation, and shortly after its formation departed for the Island of Tahiti, where he remained until in or about the month of September, 1946, when he returned to San Francisco and found that the said corporation was in a state of insolvency. In this period there were no communications actual or possible between him and the corporation or its officers.

At the first meeting of the board of directors of said corporation its attorney was requested and instructed to make application to the Corporation Commissioner of the State of California for the issuance of corporate stock, in such amounts as in his opinion were justified by the financial condition of the company; petitioner is informed by said attorney and believes and therefore alleges that in the interim last mentioned no ap-

plication was filed with the said Corporation Commissioner for the issuance of stock for the reason that the removal of the corporate business from San Francisco and its re-establishment in Burlingame involved numerous complications and distractions on the part of the company's officers and that the financial and other statements required by law and regulations for a proper application to the Commissioner could not be obtained.

In addition to the instance hereinabove cited, on three other occasions this petitioner has made financial advances to individuals whom he considered personally worthy, in order that they might individually better their condition in the community, on an agreed basis of sharing in profits and emoluments, two of which were in the ratio of equal shares and the other at a somewhat different percentage. (This modest business, by way of identification, is the MacNeil bookstore, on 7th Street across from the Postoffice Building.)

THE ISSUES SHOULD BE CONSIDERED IN REVERSE OF THE ORDER SET UP BY APPELLANTS.

First, naturally, comes the question of jurisdiction, which, if the decision of the learned District Judge is to be affirmed, disposes of the whole case.

Second, and subordinate, are the errors of the referee in his findings of fact and conclusions of law.

A REFEREE IN BANKRUPTCY IS TOTALLY WITHOUT JURISDICTION TO MAKE A "TURNOVER ORDER" OF ASSETS NOT BELONGING TO THE BANKRUPT, BUT PRIVATELY OWNED BY A THIRD PARTY.

No better exposition of the above theorem is to be found than that contained in the order of the learned District Judge herein setting aside the order of the referee (Tr. pp. 23-27).

This case is not one of first impression, and a textbook statement of the rule is:

"A court of bankruptcy has power to order the bankrupt to pay or to deliver to the trustee money or other property found to be in his possession or control, constituting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce obedience to such order by commitment as for contempt. Two conditions are essential to the exercise of this power: (1) That the money or property in question should be a part of the bankrupt estate; and (2) that it should be in the possession or under the control of the bankrupt at the time when the order for its delivery is made."

7 *Corpus Juris*, par. 229, p. 137.

In support of the above pronouncement of principle:

"Two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession. They are that the money or property directed to be delivered to the trustee is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it

in his possession or under his control at the time the order of delivery is made.”

In re Rosser, 101 Fed. 562.

Quoting the decision by Sanborn, J., *supra*:

“It will be seen from the foregoing authority that not only must the money or property ordered to be turned over be a part of the bankrupt’s estate, but it must also be established that it is in the possession or under the control of the bankrupt.”

In re Adler, 170 Fed. 634, 636.

“A bankruptcy court has jurisdiction summarily to require bankrupt to pay over money or to surrender other property in his possession or under his control *belonging to the estate*, and upon his failure or refusal so to do to attach him for contempt, but a bankruptcy court may not enter a turn-over order against bankrupt unless property or money be found in bankrupt’s possession.” (Emphasis ours.)

In re Zappala, 44 Fed.Supp. 353.

Since the decision herein, the Supreme Court for the first time (Feb. 9, 1948) has taken occasion to discuss the origin, nature and scope of turnover orders, certiorari having issued to review an adjudication of contempt against an officer of a bankrupt corporation. Instead of quoting the opinion at great length, we believe a few paragraphs of syllabi will suffice:

“Bankruptcy,—jurisdiction to issue turnover orders.

1. The procedure by which a bankruptcy court requires by its order, disobedience of which is punishable as a contempt of court, property or records of a bankrupt to be turned over to the trustee in bankruptcy, is one not expressly created or regulated by the Bankruptcy Act, but is a judicial innovation by which the court, acting under its grant of jurisdiction to ‘cause the estates of bankrupts to be collected’ and ‘of all controversies at law and in equity’ between trustees and adverse claimants concerning property claimed by the trustee, and to ‘make such orders, issues such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title’, seeks efficiently and expeditiously to accomplish ends prescribed by the statute.”

“Turnover order—basis and purpose.

6. An order requiring the turning over of property to a trustee in bankruptcy, disobedience of which is punishable as a contempt, is essentially one for restitution rather than indemnification. The primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages or tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.”

“Evidence—sufficiency to support turnover order in bankruptcy.

9. An order requiring the turning over of property to a trustee in bankruptcy must be supported by clear and convincing evidence, including proof that the property has been abstracted from the bankrupt's estate and is in the possession of the person proceeded against.”

“Burden of proof in proceedings to obtain turnover order.

10. The burden is upon a trustee in bankruptcy seeking a turnover order to prove that the property in question has been abstracted from the bankrupt estate and is presently in the possession of the person proceeded against.”

Maggio v. Zeitz as Trustee in Bankruptcy, 92 U.S. Advance Opinions, 376.

**OBJECTION TO THE REFEREE'S JURISDICTION TO MAKE THE
TURNOVER ORDER SOUGHT WAS MADE PROPERLY AND
IN LIMINE.**

The set-aside order of Brown, Dist. J., succinctly states the above as its basis (Tr. p. 24). The phraseology of the objection is assimilated from that of a general demurrer, as being that best suited to raise the issue of jurisdiction of the subject matter, with a prayer for discharge and dismissal forthwith of the order to show cause (Tr. p. 9). That this was urged, argued and specifically ruled upon *imprimis*, the following colloquy will show:

“The Referee. Really, what you are contending, Mr. McLeod, is that the corporation was the alter-ego of Mr. MacKay.

Mr. McLeod. That is true. That is what we are endeavoring to contend.

The Referee. Do you think your pleading is sufficient to show that? You have an allegation in the second paragraph to the effect that said F. W. MacKay and said corporation were and are, in reality, the same. That is an allegation of fact. I think the next sentence is really a conclusion of law. It is argumentative.

Mr. McLeod. That is a conclusion. I concede that. It is based upon the facts but that is a conclusion.

The Referee. Yes. I think the objection that the Petition for Order To Show Cause does not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, should be overruled and such is the ruling.” (Tr. pp. 95-96.)

We are far from conceding the referee’s *obiter dictum* that any allegation of fact is embodied in the words “F. W. MacKay and said corporation were and are, in reality, the same”. It is legally a fallacy and a nugacity—nothing more than a catch-phrase.

An order to show cause is not a pleading but merely a medium for summary service of a notice of motion.

42 C. J. 489.

The *riposte* to such an order is ordinarily designated as a *return*, involving only collateral issues. In this instance, that of jurisdiction being first and

foremost we chose the broader denomination of *response*.

Counsel's statement (Br. p. 13) that Appellee did not raise the question of jurisdiction prior to the entry of the referee's final order, we can characterize only as a fabrication in contravention of the record. According to the commentary of Healy, Circ. J., it was required of Appellee only that, before the referee, he "understandably protest the procedure". In abundance of precaution and in full measure, we "explicitly informed the referee".

cf. *Honeyman v. Hughes*, 156 Fed.2d 27, 29.

OF JURISDICTION—ITS DISTINCTIONS, AND OF THE MODES AND TIMELINESS OF INTERPOSING OBJECTIONS TO ITS EXERCISE.

The general field of jurisdiction is subject to numerous divisions and sub-classifications, such as general and limited, original and appellate, and many others. That with which we are here concerned is jurisdiction of the subject matter as differentiated from that of the person, and the legal incidents attaching, in that objection to latter can be waived by appearance, but the former cannot be conferred by appearance or any act of the parties.

Justice Miller's definition is:

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and it is to

be sought for in the general nature of its powers, or in authority specially conferred."

Cooper v. Reynolds, 10 Wall. 308, 316, 19 L.Ed. 931.

Quoting the above, an opinion in the Second Circuit adds:

"A general appearance cannot confer jurisdiction over the subject-matter of a suit for it is a fundamental principle of the law that consent of parties cannot give to a court jurisdiction of the subject-matter, and it consequently follows that a general or voluntary appearance does not give jurisdiction of the subject-matter." (citing authorities.)

U. S. v. New York, etc. S.S. Co., 216 Fed. 61, 67.

Want of jurisdiction of the subject matter may be taken advantage of at any stage of the proceedings.

Chicago First Nat. Bk. v. Chicago Title etc. Co., 198 U.S. 230, 49 L.Ed. 1051 (under the Bankruptcy Act);

15 *C. J.*, 847, citing columns of authorities.

Want of jurisdiction of the subject matter is ground for reversal on appeal or error.

Capron v. Van Noorden, 2 Cranch (U.S.) 126, 2 L. Ed. 229;

15 *C. J.*, 826, par. 144.

The objection may be raised for the first time on appeal.

15 *C. J.*, 849, and cited cases.

Appellee MacKay originally appeared before the referee on order of examination as a witness subpoenaed by the trustee (Tr. p. 65), a procedure within the referee's powers. Subsequently he was summoned anew under process, if it may be so called, of the order to show cause here under review, calling for the sequestration and surrender of all or any part of his private property. To any such jurisdiction he made prompt objection in writing (Tr. p. 9) and orally on the hearing (Tr. p. 88). This he ever since has and now strenuously maintains.

THE CORPORATE ENTITY OF THE BANKRUPT, BURLINGAME PRODUCTS COMPANY, CANNOT BE DISREGARDED AND APPELLEE MacKAY HELD LIABLE FOR ITS DEBTS.

This apparently was the object, vaguely conceived and insufficiently sought under the order to show cause served on Appellee. If there had been facts to justify such a judgment, and there were none, this end could have been attained only by a plenary suit in equity, and not by any summary order of a referee.

A CORPORATION, UPON ITS STATUTORY ORGANIZATION, BECOMES A LEGAL ENTITY, DISTINCT FROM ITS PROMOTERS OR SUBSEQUENT STOCKHOLDERS.

Recent federal decisions deal most frequently with the attempted imposition on stockholders of corporate income taxes, but the same principles apply without distinction to all corporate liabilities.

“A corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances—not present here—can the difference be disregarded.”

Burnet v. Clark, 287 U.S. 410, 77 L.Ed. 397;

New Colonial Ice Co. v. Helvering, 292 U.S. 435, 78 L.Ed. 1348, 1353.

Following the above decisions, the Circuit Court of Appeals, Fifth Circuit, holds:

“It is lawful to obtain a corporate charter, even with a single substantial stockholder, to engage in a specified activity, and that activity may coexist with other private business activities of the stockholder. If the corporation is a substantial one, conducted lawfully and without fraud on others, its separate identity is to be respected. The tax laws of the United States recognize corporations; they tax them differently and sometimes discriminatorially. In tax matters it is only under exceptional circumstances that the separateness of the corporation from the stockholders can be disregarded, even when there is but one stockholder.”

Ross v. Commissioner, 129 Fed.2d 310, 313.

To illustrate the strict limitations on the equitable doctrine of disregarding the corporate entity, this does not apply even to cases where the incorporation was for the express purpose of avoiding future personal liability—and there is no evidence of any such purpose with respect to Burlingame Products:

“The organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud justifying the disregard of the corporate entity. In *Elenkrieg v. Siebrecht*, 238 N.Y. 254, 144 N.E. 519, 521, the court stated: ‘Whether or not the corporation is the creature of Siebrecht is not a determining feature. Whether it be a subterfuge is misleading. Many a man incorporates his business or his property and is the dominant and controlling feature of the corporation. He may do so for the very purpose of escaping personal liability.’

“Wormser, in his ‘Disregard of the Corporate Fiction’, goes far in holding a parent corporation liable for the debts of its subsidiary where the latter is formed for a fraudulent purpose, but he distinctly limits the rule as follows (p. 18): ‘It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is why most people incorporate, and those dealing with corporations know, or at least are presumed to know, the law in this regard.’ ”

Gledhill v. Fisher & Co. (Mich.), 262 N.W. 371, 373.

In the New York case quoted in the foregoing it is further said:

“The fact that one man may own all but a few shares of the stock, and be in fact the dominant and controlling factor or the only active manager of the corporation, is no evidence in and of itself that the corporation does not exist as a person in

the eyes of the law actually owning, operating, and controlling property.”

Elenkrieg v. Siebrecht, supra, 144 N.E. 519, 521.

In brief, the device of disregarding corporate entity is a shield for protective use only against fraud, designs unconscionable in equity and avoidance of obligations imposed by law, and not as a sword to attack lawful acts.

CONCLUSION.

It is submitted that the order of the learned District Judge setting aside and vacating the order of the referee be affirmed without the requirement of a remand to re-examine the question of disregarding the corporate entity of the bankrupt.

Dated, San Francisco,

August 27, 1948.

Respectfully submitted,

NATHAN MORAN,

Attorney for Appellee.

No. 11,937

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For the Ninth Circuit

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vs.

F. W. MacKAY,

Appellee.

APPELLANT'S REPLY BRIEF.

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PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
The referee in bankruptcy had jurisdiction to make the “turnover order” upon appellee	2
When objections may be interposed to the referee's lack of jurisdiction in summary proceedings	4
The referee had summary jurisdiction to disregard corporate entity and hold appellee liable for corporate debts	5
The separate entity of a corporation may be disregarded....	6
Conclusion	7

Table of Authorities Cited

Cases	Page
Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195	5
Macdonald v. Plymouth County Trust Co., 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093, 20 A.B.R. (N.S.) 1.....	6

Statutes

Bankruptcy Act, Section 23 (11 U.S.C.A. 46)	5
---------------------------------------------------	---

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Appellee.

APPELLANT'S REPLY BRIEF.

In his Reply Brief Appellant has no wish to repeat the substance of his position as set forth in his Opening Brief, and relies on his opening argument to controvert the propositions made by Appellee and in support of Appellant's contention that the Order of the District Court herein should be reversed.

Appellee, in his Reply Brief, controverts Appellant's statement of the case and the facts brought out in the testimony taken before the Referee. Appellant believes that a reading of the testimony (Tr. pp. 35-97) will clearly show the error of such allegation.

**THE REFEREE IN BANKRUPTCY HAD JURISDICTION TO
MAKE THE "TURNOVER ORDER" UPON APPELLEE.**

As to whether or not the Referee had jurisdiction to make the Turnover Order complained of, Appellee has failed to furnish authorities in opposition to the various decisions cited by Appellant in his Opening Brief to the effect that a challenge by adverse claimants to the summary jurisdiction of the Bankruptcy Court must be made prior to the entry of a *final order* by a Referee. As was heretofore stated in Appellant's Opening Brief, which statement, it is believed, is borne out by the Transcript of the Record, Appellee failed to present such a challenge to the Referee before the latter had made his final Order. It was not until Appellee filed his Closing Brief with the District Court that he made such a challenge, and this, as confirmed by the authorities cited by Appellant in his Opening Brief, came entirely too late. Failure of Appellee so to object in a timely manner constituted his consent to the jurisdiction of the Referee.

Appellee now bases his argument that the Referee lacked jurisdiction on the contention that, regardless of whether the jurisdiction of the Referee was challenged before the Referee's final Order was made, the Referee totally lacked the authority to make such Order because of the absence of two conditions essential to the exercise of this power, namely, (1) that the money or property in question must be a part of the bankrupt estate, and (2) that it should be in the possession or under the control of Appellee at the time when the Order for its delivery is made.

The Referee found that the bankrupt corporation is, and at all times since its organization, in truth, has been the Appellee, who, as an individual, has disregarded the substance and/or form of said corporation, and has treated the affairs of said corporation as his own and as a part of his own enterprise. The corporate entity was thus disregarded, and Appellee and the bankrupt corporation found to be one and the same.

It therefore follows from the Findings of Fact and Conclusions of Law of the Referee that any money or property of the bankrupt corporation constitutes an asset of Appellee as an individual, insofar as this bankruptcy proceeding is concerned and, conversely, that any money or property of Appellee is subject to administration in the bankruptcy proceeding up to and including such amount or value as may be necessary to satisfy claims of creditors and expenses of administration of the bankruptcy proceeding.

The first essential requirement to give jurisdiction to the Referee to make such Order is therefore satisfied.

Appellee cites a number of decisions to the effect that a Turnover Order must be based upon proof that the property has been abstracted from the bankrupt's estate and is in the possession of the person proceeded against. This is not the situation with which we are here dealing. No contention is made by Appellant that any property has been abstracted by

Appellee from the bankrupt's estate. On the contrary, the situation is that Appellee and the bankrupt corporation have been found to be one and the same and Appellee has not turned over any of his assets to Appellant as Trustee of the bankrupt estate for administration therein. He has been ordered to do so to the extent required by the Turnover Order of the Referee.

Appellee has never attempted to deny that he has the means with which to satisfy the terms of the Order. In fact, in his Affidavit in response to the Order to Show Cause (Tr. pp. 10-15) he asserts that he has "an income sufficient to supply his wants" and that he has from time to time advanced financial aid to worthy individuals, from which statement it may be assumed that he does have more than just an income sufficient to supply his wants and that he could, if he should be so inclined, continue his practice of advancing financial aid to other worthy individuals in the future. If such assumption be in error, then Appellee is free to so inform the Referee after the latter's Order is affirmed by this Court and the enforcement of its conditions are attempted by the Appellant.

**WHEN OBJECTIONS MAY BE INTERPOSED TO THE REFEREE'S
LACK OF JURISDICTION IN SUMMARY PROCEEDINGS.**

Appellee, on pages 11 and 12 of his Brief, discusses the question of jurisdiction generally in an attempt to disprove the lack of jurisdiction of the Referee.

Among the authorities or rules cited are (1) that want of jurisdiction of the subject matter may be taken advantage of at any stage of the proceeding, and (2) that such objection may be raised for the first time on appeal.

The first statement is subject to the additional condition, insofar as it may relate to the Bankruptcy Court and the facts upon which this appeal is based, that the opportunity to raise the point of want of jurisdiction ceases when the Referee has made his final order.

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195.

This, and other decisions heretofore cited by Appellant in his Opening Brief, also refute Appellee's statement that such objection may be raised for the first time on appeal.

THE REFEREE HAD SUMMARY JURISDICTION TO DISREGARD CORPORATE ENTITY AND HOLD APPELLEE LIABLE FOR CORPORATE DEBTS.

Appellee suggests that only by a plenary suit in equity, and not by any Summary Order of a Referee, could the corporate entity of the bankrupt be disregarded and Appellee held liable for its debts.

But the Referee is a "court of bankruptcy" within the meaning of the Act, Sec. 23, (11 U. S. C. A. Sec. 46) giving such a court jurisdiction of a plenary suit by the Trustee and the Referee has summary

jurisdiction to decide the issues that would be raised if the suit had been such a plenary suit, as distinguished from the present instance of an Order to Show Cause in a summary proceeding, provided that the right to a plenary suit has been waived and both sides have consented to the jurisdiction.

Macdonald v. Plymouth County Trust Co., 286

U.S. 263, 52 S. Ct. 505, 76 L. Ed. 1093, 20

A.B.R. (N.S.) 1.

It is the contention of Appellant that by failing to properly object in a timely manner, Appellee waived his right to a plenary suit on the issues involved herein, and consented to the summary jurisdiction of the Referee to determine such issues.

**THE SEPARATE ENTITY OF A CORPORATION
MAY BE DISREGARDED.**

Appellant, in his Opening Brief, has already dealt with the question of separate corporate entity and the doctrine under which such corporate entity may be disregarded by the courts.

The authorities cited by Appellee on this point do not appear to be in conflict with those cited by Appellant. They merely set forth the general rule that a corporation is an entity separate and distinct from its stockholders. But, as Appellant has heretofore submitted, this general rule is subject to the well recognized and firmly settled exception to this general rule that when necessary to redress fraud,

protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence. Of course, no stockholders of the bankrupt corporation, exist, or ever existed, and no shares of stock of the bankrupt corporation were ever issued.

CONCLUSION.

It is submitted that the Order of the District Court setting aside the Order of the Referee in Bankruptcy directing Appellee to turn over to Appellant his sole individual assets be reversed.

Dated, San Francisco, California,
September 20, 1948.

Respectfully submitted,

JAMES M. CONNERS,

STANLEY M. McLEOD,

Attorneys for Appellant.

No. 11938.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Bo C. ROOS and FREDERICK M. MACMURRAY, individually
and as partners, trading and doing business as Beverly-
Wilshire Enterprises,

Appellants.

vs.

TIGHE E. WOODS, Acting Housing Expediter, Office of
the Housing Expediter,

Appellee.

BRIEF FOR APPELLANTS.

FILED

SEP 3 - 1948

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TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	2
Argument	4

I.

The finding by the District Court that Morgan Conway occupied Unit No. 609 at a monthly rate of rent was clearly erroneous	4
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bradburn v. McIntosh, 159 F. (2d) 925.....	9
Campbell v. Mueller, 159 F. (2d) 803.....	9
Dumas v. King, 157 F. (2d) 463.....	9
Davis v. Johnson, 157 F. (2d) 264.....	9
General Metals Powder Co. v. Wellman Co., 157 F. (2d) 505....	9
Mycalex Corp. v. Pemco Corp., 159 F. (2d) 907.....	9
Union Producing Co. v. White, 157 F. (2d) 254.....	9
White v. Bruce Co., 163 F. (2d) 304.....	9

STATUTES

Emergency Price Control Act of 1942, Secs. 205(e), 205(c) (50 U. S. C. A., App., Sec. 901 et seq.).....	1
Judicial Code, Sec. 128 (28 U. S. C. A., Sec. 225).....	1

No. 11938.
IN THE
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Appellants.

vs.

TIGHE E. WOODS, Acting Housing Expediter, Office of
the Housing Expediter,

Appellee.

BRIEF FOR APPELLANTS.

Jurisdictional Statement.

This is an appeal by Bo C. Roos and Frederick M. MacMurray, defendants below, from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered on the 20th day of February, 1948, awarding judgment to the plaintiff for the benefit of one Morgan Conway. The action was brought by the Housing Expediter pursuant to Section 205(e) and Section 205(c) of the Emergency Price Control Act of 1942, as amended, hereinafter called the Act (U. S. C. A., Title 50, App., Sec. 901 *et seq.*). Notice of appeal was filed by the defendants on April 16, 1948 [Tr. Vol. I, p. 80]. Jurisdiction of the District Court was invoked under Section 205(c) and 205(e) of the Act [Tr. Vol. I, p. 9], and of this Court under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statement of the Case.

The action, instituted by the Housing Expediter, sought (1) treble damages for certain alleged violations involving two tenants, one Langstaff and one Conway, both of whom occupied Apartment No. 609 during different periods of time, (2) a mandatory refund to said tenants of said alleged overcharges, and (3) an injunction prohibiting the defendants from violating the Act or regulations issued thereunder. The apartment house involved, which contains ninety-six rental units, was erected in 1913 [Tr. Vol. II, p. 45] and since that date had customarily been operated as an apartment hotel [Tr. Vol. II, p. 51]. In 1942, however, and until 1945, the Office of Price Administration only permitted the units in said building to be rented on a monthly basis. On February 27, 1945, the Price Administrator recognized daily rates for three of the units in the accommodations, including unit No. 609 [Tr. Vol. I, p. 72]. At this time said unit was occupied by a tenant at a monthly rate of rent. The first opportunity the defendants had to put the new daily rate into effect [Tr. Vol. II, p. 88] was when the said Langstaff and his wife moved into the accommodations on December 1, 1945 [Tr. Vol. II, p. 5]. When the said Langstaffs vacated said unit No. 609 on May 13, 1946, one Morgan Conway and his wife moved into said accommodations and remained there until June 5, 1947 [Tr. Vol. II, p. 14]. The complaint alleged that these two tenants were overcharged a total of some \$984.00 during the periods of their occupancy [Tr. Vol. I, p. 12].

It was stipulated at the trial that only one question was in dispute, *i. e.*, whether said tenants Langstaff and Conway occupied unit No. 609 at a daily rate of rent or a monthly rate of rent [Tr. Vol. II, pp. 2, 9].

It was further stipulated [Tr. Vol. I, pp. 31-32] that the defendants had an approved O.P.A. rate of \$6.00 per day for two persons when said unit was rented at a daily rate, and that said unit had a monthly rate of \$100.50 for two persons when said unit was rented at a monthly rate, and that the said Langstaffs, during the period of their occupancy from December 1, 1945, until May 1, 1946, paid a total rental of \$700.00, while the said Conways, during their period of occupancy from June 1, 1946, to March 1, 1947, paid a total rent of \$1,620.00.¹

Thus, if the said Langstaffs and Conways were occupying said unit at a daily rate, no overcharge occurred; if said persons occupied said accommodations at a monthly rate, an overcharge did occur. The District Court held that the Langstaffs, during their occupancy of said unit, were only entitled to a daily rate and that therefore no overcharge occurred as to them; that the Conways were only entitled to a daily rate from the 13th day of May, 1946, until June 1, 1946 (and that therefore no overcharge occurred during said period) but that from June 1, 1946, forward, the Conways were entitled to a monthly rate. Judgment was accordingly rendered against the defendants in the sum of \$636.00. From this judgment defendants appeal.

¹This figure was changed slightly at the trial inasmuch as the testimony disclosed that the Conways actually moved into the accommodations on May 13, 1946, instead of June 1, 1946 [Tr. Vol. II, p. 14].

ARGUMENT.

I.

The Finding by the District Court That Morgan Conway Occupied Unit No. 609 at a Monthly Rate of Rent Was Clearly Erroneous.

Although the trial Court considered numerous irrelevant factors in arriving at its decision,² the actual issue before the Court was whether the oral contract entered into between Conway and the defendants specified a daily rate of rent or a monthly rate of rent.³ The burden of proof was on the plaintiff to show that the said Conway was entitled to a monthly rate of rent by reason of the rental arrangements originally entered into between the parties.

The rental contract was made between Mrs. Blanche Bryson, the manager of the Bryson Apartments, and Morgan Conway himself. In addition, a conversation was held between Morgan Conway and one R. C. Palmer, the auditor for the apartment house. Mrs. Bryson testified, in unequivocal terms, that Mr. Conway inquired, prior to

²The trial court indicated that the tenant Langstaff was only entitled to a daily rate as he was "more or less * * * a transient," while Conway occupied said unit for approximately one year [Tr. Vol. II, p. 86]; that the said Conway paid his rent once a month instead of each day [Tr. Vol. II, pp. 86-87]; that the person occupying unit No. 609 at the time OPA granted defendants permission to charge a daily rate was not immediately charged the higher rate [although it was stipulated by both counsel that the new rate could only be put into effect as regards a new tenant] [Tr. Vol. II, pp. 87-88]; that the defendants waited until the end of the tenancy to submit an additional bill [Tr. Vol. II, p. 90] although, actually, no "additional" bill was submitted; and that no daily rates were posted in the unit, thereby depriving the tenants of the knowledge that they were being charged at a daily rate [Tr. Vol. II, p. 91].

³It was stated by the District Court during the trial that "it seems to me the main consideration is what arrangements were made and what was said between them when he first went there" [Tr. Vol. II, p. 30].

renting said apartment, as to what rent would be charged and that she (Mrs. Bryson) replied that she "had nothing except on a daily rate, one apartment, and it was a daily rate of \$6.00 a day * * *. He asked the rate and I said to him 'It is a daily rate.' It was very clear. 'I can only rent this to you on a daily rate.' He said it was satisfactory and we had no further conversation about its being not so" [Tr. Vol. II, pp. 50, 59]. Mr. Palmer, the auditor, testified that within a day or two after Conway moved into the accommodations Conway inquired of him regarding the manner in which his rent should be paid, and that he (Palmer) replied "Of course, you know it is \$6.00 a day for the two * * *. We can bill you any way you wish" and that it was thereupon agreed that he would send him a statement once each month [Tr. Vol. II, pp. 73-74].

Thus, if the decision of the lower court is to be sustained, it must be on the basis of the testimony given by Conway, as the testimony of both Mrs. Bryson and Mr. Palmer shows conclusively that the accommodations were let to Conway at a daily rate of rent and not at a monthly rate. But the findings are given no support by Conway's testimony which, at best, is vague and indefinite throughout. In response to an attempt by defendant's counsel to obtain Conway's version of the rental agreement, the following testimony was given [Tr. Vol. II, p. 24]:

"Q. Was there anything stated regarding the rate you were to pay for the apartment? A. At that time, for the period, it was a partial month. It was around the 13th. And, until then, I paid \$6.00 a day or \$108.00 for the 18 days. That was the bill submitted to me.

Q. Did you understand you were renting an apartment at the rate of \$6.00 per day? A. Why, frankly, no. I expected to stay on there and live there.

Q. Did you understand that the rate for the apartment was \$6.00 per day? A. Well, I was given a bill for \$108 and I would say that is \$6.00 a day.

Q. Did you have any discussion, prior to the time you were given a bill, about what the rate would be?

A. Yes. At that time I talked with Mrs. Bryson or Mr. Palmer.

Q. Didn't she tell you at that time the rate was \$6.00 a day for that apartment? A. Well, it must have been \$6.00. I mean I was given a bill for \$108 and 18 days and I paid it. So it must be. All I know is at the start of the month I got a bill for \$180."

Counsel continued to demand a definite answer regarding the \$6.00 a day rate [Tr. Vol. II, p. 26]:

"Q. Do I understand that you did have a conversation with Mrs. Bryson prior to the time you moved in, or contemporaneously therewith, wherein she told you the rate for this month was \$6.00 per day?

Mr. Solof: That is what the witness testified to.

* * * * *

A. It must have been on that basis until the end of the month. We had lived at the Beverly-Wilshire and we were put out after five days, and we understood, when we moved there, we would be permanent guests. And you couldn't stay in a place after five days, in a hotel.

Q. By Mr. Bent: Do you recall whether that was told you or not? A. What was told to me, sir?

Q. That the rate was \$6.00 per day for you and your wife. A. It would be at least on that basis up until the end of the month, which is evidenced by the bill that was submitted to me for \$108.

Q. Do you recall that that was told to you? Is your answer yes or no to that? A. It must have been that. It had to be that."

Mr. Conway further testified that he had no further conversation regarding the payment of rent or the rate he was to pay but that "a bill came in at the first of the month for \$180 and I paid it. I had no reason to have any further conversation" [Tr. Vol. II, p. 27].

The District Court itself finally took over the witness Conway [Tr. Vol. II, pp. 34-35:

"The Court: What inquiry did you make, if any about the rent? What did you ask or what was said? A. Whether I asked or whether Mrs. Bryson voluntarily told me what the rental was, I don't recall. In other words, I don't know whether I asked, 'What is the rent?' or she said 'The rent will be \$6.00 a day until the end of the month, and then we will submit a bill to you on the 1st of each month.'

The Court: Then, there was a statement by somebody, or by Mrs. Bryson, that the rent would be \$6.00 a day until the end of the month and thereafter a bill would be submitted? A. That is right.

The Court: And that is all there was? A. Of \$180 a month.

The Court: That a bill would be submitted to you at the rate of \$180 a month? A. Yes, sir."

The Court continued to press for the actual conversation and the witness Conway then repudiated his former statements [Tr. Vol. II, pp. 35-36]:

“The Court: You were to pay \$180 a month after the 1st of the month, in advance, is that correct, and the bill would be submitted to you? Is that correct?

A. Well, maybe, after I got the first bill for \$108, I naturally assumed they would send me a bill for 180. They submitted a bill to me, two days after, for the \$108 and I paid it, and thereafter a bill was submitted for \$180 a month.

The Court: And you paid it? A. Yes.

The Court: And you continued to pay it? A. I continued to pay it. * * *

The lower court specifically held that Conway entered into a rental agreement to pay \$6.00 a day for the accommodations, at least until the first day of June, 1946, as conclusion of law No. 2 specifically so states [Tr. Vol. I, pp. 46-47]. Conway's statement, quoted above, that he was advised he would be “billed” once a month certainly could not change this definite agreement relating to the “rate” he was to be charged. To argue that the frequency the rent was paid overrode a definite agreement as to the rate of rent would be to argue that the Judges of this Court, because they receive their salaries once each month, are on monthly tenure. However, Conway later stated that he had perhaps only “assumed” that he had been told a monthly bill would be sent him [Tr. Vol. II, p. 36].

Appellants submit that in view of the above, the lower court's decision is not only clearly erroneous in holding that the tenant Conway occupied the accommodations un-

der an agreement providing for a monthly rate of rent,⁴ but that said decision is totally unsupported by any substantial evidence. In fact, no permissible inferences in support of the Court's decision can be drawn from any portion of the record below. Counsel for plaintiff made much of the fact that the statements rendered Conway called for \$180.00 each month regardless of the fact that some months contained thirty days while others contained thirty-one [Tr. Vol. II, pp. 76-78]. However, the uncontradicted testimony was that it is the customary practice in hotel and apartment house operations to consider every month as containing thirty days [Tr. Vol. II, pp. 57-59].

The maximum rent for unit No. 609 as a partially furnished unit without services was in the sum of \$100.50 [Tr. Vol. I, p. 74]. The actual effect of the Court's order was to permit Conway to occupy this unit as a fully furnished unit with daily services given for \$100.50 in direct violation of the rental agreement.

⁴Although there is no substantial evidence to support the lower court's findings, it is clear that appellants need not argue this far in view of recent decisions interpreting Rule 52(a) of the Federal Rules of Civil Procedure, which rule adopts the equity practice of review in situations of this type as it existed prior to the passage of the Federal Rules in 1938. See *Dumas v. King* (C. C. A. 8th, 1946), 157 F. (2d) 463; *Union Producing Co. v. White* (C. C. A. 5th, 1946), 157 F. (2d) 254; *Bradburn v. McIntosh* (C. C. A. 10th, 1947), 159 F. (2d) 925; *Mycalex Corp. of America v. Pemco Corp.* (C. C. A. 4th, 1947), 159 F. (2d) 907; *Campbell v. Mueller* (C. C. A. 6th, 1947), 159 F. (2d) 803; *White v. Bruce Co.* (C. C. A. 3d 1947), 163 F. (2d) 304; *General Metals Powder Co. v. S. K. Ullman Co.* (C. C. A. 6th, 1946), 157 F. (2d) 505; *Davis v. Johnson* (C. C. A. 9th, 1946), 157 F. (2d) 264.

Conclusion.

Appellants submit that for the reasons stated herein, the findings of the District Court are clearly erroneous and the judgment should be reversed.

Dated this 3rd day of September, 1948.

Respectfully submitted,

HERBERT H. BENT,

Attorney for Appellants.

No. 11938

**In the United States Court of Appeals
for the Ninth Circuit**

**BO C. ROOS AND FREDERICK M. MACMURRAY, INDIVID-
UALLY AND AS PARTNERS, TRADING AND DOING BUSI-
NESS AS BEVERLY-WILSHIRE ENTERPRISES, APPELLANTS**
vs.

**TIGHE E. WOODS, ACTING HOUSING EXPEDITER, OFFICE
OF THE HOUSING EXPEDITER, APPELLEE**

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CEN-
TRAL DIVISION**

BRIEF FOR APPELLEE

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SUBJECT INDEX

	<i>Page</i>
Jurisdiction.....	1
Statutes and Federal Rules of Civil Procedure.....	2
Facts.....	1
Argument:	
I. There is no merit in the appellant's contention that the District Court erred in finding that Morgan Conway occupied Unit No. 609 at a monthly rate.....	2
a. Consideraion of appellant's argument.....	8
Conclusion.....	12

TABLE OF CASES

<i>Chatz v. Armour Plant Employee's Credit Union</i> , 154 F. 2d 236 (C. C. A. 7th).....	12
<i>Cherry-Burrell Co. v. Thatcher</i> , 107 F. 2d 65 (C. C. A. 9th).....	5
<i>Coffin-Redington Co. v. Porter</i> , 156 F. 2d 113 (C. C. A. 9th).....	5
<i>Columbian National Life Insurance Co. v. A. Quandt & Sons</i> , 154 F. 2d 1006 (C. C. A. 9th).....	5
<i>Dumas v. King</i> , 157 F. 2d 463 (C. C. A. 8th).....	9
<i>Goldstein v. Polakof</i> , 135 F. 2d 45 (C. C. A. 9th).....	5
<i>Lumberman's Mutual Casualty Co. v. McIver</i> , 110 F. 2d 323 (C. C. A. 9th).....	5
<i>Shyman v. Fleming</i> , 163 F. 2d 461 (C. C. A. 9th).....	7
<i>Unitea States v. Aluminum Company of America</i> , 148 F. 2d 416 (C. C. A. 2d).....	7
<i>Unitea States v. United States Gypsum Co.</i> , 333 U. S. 364.....	6
<i>Wingate v. Bercut</i> , 146 F. 2d 725 (C. C. A. 9th).....	5

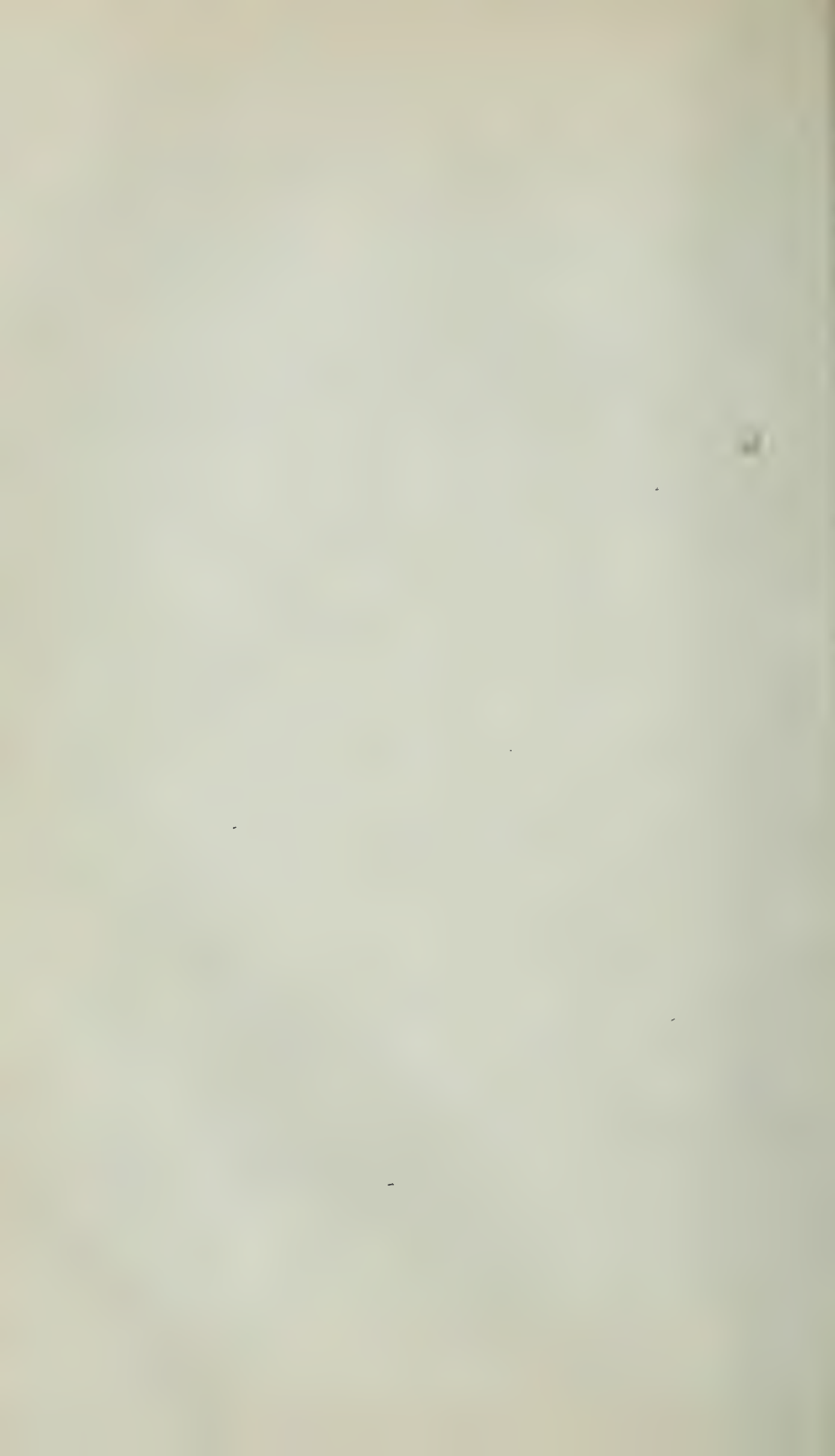
STATUTES

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.):	
Section 205 (a).....	13
Section 205 (c).....	13
Section 205 (e).....	14

MISCELLANEOUS

Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c):	
Rule 52 (a).....	5, 14

(I)



In the United States Court of Appeals for the Ninth Circuit

No. 11938

**Bo C. ROOS AND FREDERICK M. MACMURRAY, INDIVID-
UALLY AND AS PARTNERS, TRADING AND DOING BUSI-
NESS AS BEVERLY-WILSHIRE ENTERPRISES, APPELLANTS**

vs.

**TIGHE E. WOODS, ACTING HOUSING EXPEDITER, OFFICE
OF THE HOUSING EXPEDITER, APPELLEE**

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CEN-
TRAL DIVISION*

BRIEF FOR APPELLEE

JURISDICTION

This action was brought pursuant to Sections 205 (a), (c), and (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Sec. 901 et seq.). Judgment of restitution was rendered upon authority of Section 205 (a) thereof.

FACTS

The sole question presented in this appeal is whether the District Court erred in finding as a fact that the tenant Morgan Conway rented the defendant's premises at a monthly, rather than a daily, rate. The maximum rent on a monthly basis was \$100.50 to

Conway and his wife (Vol. I, Tr. 76-79). The maximum rent to Conway and his wife on a daily basis was \$6.00 (Vol. I, Tr. 72). The defendants collected \$180.00 per month based on the \$6.00 rate for a "30 day period" (Vol. I, Tr. 56-66). Finding that the tenant rented the premises on a monthly rate, the Court ordered restitution of the overcharges based upon the difference between the maximum rent of \$100.50 per month and the \$180.00 actually collected, from June 1, 1946 to February 28, 1947 (Concl. of Law 3, Vol. I, Tr. 47 and 48).

STATUTES

The pertinent sections of the Statute and Federal Rules of Civil Procedure appear in the Appendix.

ARGUMENT

I

The District Court's finding that Morgan Conway occupied Unit No. 609 at a monthly rate, finds substantial support in the record. In no event was the finding so clearly erroneous that it should be set aside

Contrary to appellant's contention, the trial Court's finding that Conway occupied Unit No. 609 at a monthly rate is amply sustained by the record. This finding of fact finds support particularly in the testimony elicited upon cross-examination of R. C. Palmer, appellants' auditor for the premises who prepared the bills which Conway paid. (Vol. II, Tr. 76-78.)

The COURT. But you didn't bill him for 30 days, did you? You billed him for the month, didn't you?

A. Well, we considered——

The COURT. It isn't what you considered but you did bill him for the month?

A. I billed him 30 days at \$6.00 a day.

The COURT. Where are your bills to show that?

A. From 6-1 to 7-1, I billed him \$180.

The COURT. Look over all of the bills there and show me a bill that is billed on a 30-day basis.

A. That is a 30-day basis.

The COURT. What month was that?

A. June.

The COURT. That happens to have 30 days.

A. Yes. And the next month was from 7-1 to 8-1, which was for 30 days.

The COURT. What does the bill show?

A. \$180.

The COURT. That is 31 days, isn't it? July has 31 days?

A. That is right.

The COURT. And you billed him for 30 days?

A. That is right.

The COURT. This is from 7-1 to 8-1, 1946?

A. That is right.

The COURT. That is, you billed him from July to August, July 1st to August 1st?

A. The rent would be due again on August 1st.

The COURT. And you billed him for \$180, and it would be 31 days, is that right?

A. That is right.

The COURT. I want you to show me a bill for a 31-day month, where you billed him for 30 days. Have you got one there?

A. That is one of them, a 31-day month, with a billing for 30 days, the very next one, August to September.

Q. Now, here is February, February, 1947, from 1-1 to 2-1, 1947, \$180. How did you happen to bill him for the \$180?

A. As I say, all of the months are considered 30 days and, if we had charged him 31 days for a month, in a year's time he would have paid more than if he paid it this way, because there are seven extra days in the year, and in February there are only three to complete the month.

The COURT. You say you billed him on a 30-day basis, but the bills show——

A. I am assuming we considered every month 30 days.

The COURT. It isn't what you considered but what you sent out. You sent out a bill, from month to month, for the current month and not for any 30-day basis? That is all I wanted to get clear in my mind.

A. To me, I billed him for 30 days because, as I say, 30 days is a month to us in the apartment house business.

The COURT. That is all I have to ask.

In addition to the above the Transcript also shows that on June 1, 1946, Conway was billed in advance from "6/1/1946 to 7/1/1946" (a 30-day period) for \$180.00 (Vol. I, Tr. 52); he was billed in advance from "8/1/1946 to 9/1/1946" (A 31-day period) for \$180.00 (Vol. I, Tr. 54); and he was billed in advance from "2/1/47 to 3/1/47" (a 28-day period) for \$180.00 (Vol. I, Tr. 61).

On the basis of the testimony referred to above, the finding of the Court below is amply sustained and may not be disturbed. Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c)) provides in part:

* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
* * *

In applying the above rule this Court has repeatedly held that where a finding is not clearly erroneous it is "obliged to accept it." *Coffin-Redington Co. v. Porter*, 156 F. 2d 113 (C. C. A. 9th); *Columbian National Life Insurance Co. v. A. Quandt & Sons*, 154 F. 2d 1006 (C. C. A. 9th); *Wingate v. Bercut*, 146 F. 2d 725 (C. C. A. 9th), *Goldstein v. Polakof*, 135 F. 2d 45 (C. C. A. 9th), *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65 (C. C. A. 9th); *Lumberman's Mutual Casualty Co. v. McIver*, 110 F. 2d 323 (C. C. A. 9th).

In the *Coffin-Redington* case, *supra*, this Court after viewing the entire Record sustained the finding of the trial Court that the defendants violated the Emergency Price Control Act by a tie-in sale of liquors, stating at p. 114:

The trial court observed their conduct and demeanor while on the stand, and was in better position than we to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. (*Columbian National Life Ins. Co. v. A. Quandt & Sons*, 9 Cir., 154 F. 2d 1006.

In *United States v. United States Gypsum Co.*, 333 U. S. 364, the Supreme Court recently defined the term “clearly erroneous” as used in Rule 52 (a). There the Court said, at p. 395:

A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The appellant devotes the greater part of his brief to showing that the testimony was contradictory, which is true. He also attempts to create greater weight for the testimony of his witnesses, as against the “vague and indefinite” (Br. 5) testimony of the tenant Conway.

The “entire evidence” in the case at bar, shows a conflict of testimony on the basic rental agreement. The tenant, however, unequivocally denied renting at a daily rate.

Q. Did you understand you were renting an apartment at the rate of \$6.00 per day?

A. Why, frankly, no. I expected to stay on there and live there (Vol. II, Tr. 24).

Further, the testimony of Palmer, the defendants’ auditor (p 2, *supra*), showed a monthly rather than a daily rental, and Exhibit 1 (Vol. I, Tr. 51-61) is the collected monthly statements given to Conway by the defendants, charging him \$180.00 on a 30-day (or monthly) basis. The contrary evidence in support of defendants’ case was that of Blanche Bryson, manager (Vol. II, Tr. 50), and Palmer’s direct testimony (Vol. II, Tr. 73) to the effect that they told Conway

the rent on apartment 609 was \$6.00 per day. Certainly, on the basis of a record in which five people testify in direct contradiction and where documentary proof substantiates the trial Court's finding, an appellate Court could not conceivably be "left with the definite and firm conviction that a mistake has been committed." (See *Shyman v. Fleming*, 163 F. 2d 461, 463, C. C. A. 9th.)

In appeals where the Record shows conflicting testimony the Courts have held that a finding by the trial Court on the basis of that evidence is "unassailable" in the Court of review (*United States v. Aluminum Co. of America*, 148 F. 2d 416, 433 (C. C. A. 2d). The Court in that case, speaking through Judge Learned Hand, stated the rule as follows:

* * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." *Davis v. Shwartz*, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co. v. Ickes*, 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part and often by no means the most important part, of the sense impressions which we use to make up our minds. *Morris Plan Industrial Bank v. Henderson*, 2 Cir., 131

F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases (at p. 433).

So, too, in this case where the Court below had the opportunity to observe the witnesses, and weigh each one's statements upon the basis of all factors before it, this Court should give due weight to the findings based upon those factors.

This Court stated the rule to be as follows, in *Columbian National Life Insurance Company v. A. Quandt & Sons* (154 F. 2d 1006) :

Where there is a conflict in the evidence, this court must keep in mind that the trial judge who hears and sees the witnesses has a better opportunity to appraise their credibility and judge the weight to be attached to their testimony. We cannot say that the finding of the lower court was clearly erroneous. It is the rule that the findings of the trial court are to be accepted on appeal unless clearly wrong.

a. Consideration of appellants' argument

The appellants, at the outset of their arguments, accuse the Court below of arriving at its finding through consideration of "numerous irrelevant fac-

tors'' (p. 4 of brief). We do not think that this unwarranted charge against an experienced and able trial judge is supported by the record. Evidently, appellants are of the opinion that the decision of a trial Court on any given question must be arrived at in a vacuum. The Courts, however, have taken a more balanced view of the judicial process. As the Court of Appeals said in *Dumas v. King*, 157 F. 2d 463 (C. C. A. 8th), cited by appellant (Br. 9), in describing the function of the trial Court in arriving at its findings:

To weigh opposing evidence, determine credibility of witnesses, and choose between permissible inferences is the function of the trial court, and findings of fact thus made cannot ordinarily be said to be clearly erroneous if they are supported by substantial evidence. *Kincade v. Mikles*, 8 Cir., 144 F. 2d 784, 787 (at p. 465).

Therefore, there was nothing that occurred at the trial below, whether of testimony, demeanor of witnesses, documentary evidence, or circumstances surrounding the various transactions that were not material and relevant to the trial Court in arriving at its decision. Having arrived at its decision on the basis of these factors an appellate Court will not lightly overturn it (See cases, p. 5, *supra*), for the application of the rule in this Circuit, and cases cited by appellants (Br. Footnote 4, p. 9).

In their brief, appellants explain that “* * * it is the customary practice in hotel and apartment house operations to consider every month as containing

thirty days" (Br. 9). If a month is considered to be a 30-day period, it would follow that both for billing and renting purposes the terms "month" and "30-day period" are synonomous. Hence, when R. C. Palmer says "* * * 30 days is a month to us in the apartment house business," he means that the terms are interchangeable. When Conway was billed on a 30-day basis, he was therefore simultaneously billed on a monthly basis. It is not only specious for appellant to argue that Conway was charged the daily rate on a monthly basis, but likewise there is no merit to the contention that the finding below was manifestly erroneous, where the record amply shows that Conway was not charged nor did he pay \$6.00 per day for each day's occupancy.

Furthermore, appellants took the position upon the trial that the tenant was billed on a daily basis and that its practice of billing every thirty days, regardless of the number of days in the month, followed the practice prevailing in hotel and apartment-house operations of considering every month as containing thirty days (brief p. 9). If that was the billing practice for the daily basis, what then was the billing practice on the monthly basis? Appellants did not say. Yet, for all that appears, the billing practice ascribed by appellants to be limited to hotels and apartments on a daily basis, might have been precisely the practice used in these accommodations on a monthly basis. At any rate, as the Court below aptly observed (Vol. II, Tr. 91):

People who rent their apartments on daily rates should make their position known in some

positive fashion, either by posting something in the rooms or submitting a bill that will at least give the other person, the tenant, an intimation that that is the arrangement.

In their brief (p. 8) the appellants take the isolated factor of the form of rent payment, and argue that monthly billing "overrode a definite agreement." Appellants beg the question. The trial had before it the entire Record of conflicting testimony plus documentary evidence. Considering all of the testimony the Court determined what the original rental agreement was and therefore did not "change this definite agreement," as appellants contend. That determination (Concl. of Law 3, Vol. I, Tr. 47) must be given due weight by this Court. (*Coffin-Redington v Porter, supra*; *Columbia National Life Insurance Company v. A. Quandt, supra*; *Bercut v. Wingate, supra*.)

Appellants in their footnote 4 (Br. 9) emphasize that the Rule 52 (a) follows the former equity practice. We agree. The Supreme Court in discussing the application of Rule 52 (a) has recently so held. "It was intended, in all actions tried upon the facts without a jury to make applicable the then prevailing equity practice." (*United States v. United States Gypsum Company*, 333 U. S. 365, 395.) But following the equity practice simply means that in applying Rule 52 (a) " * * * findings of the trial Court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate Court" (*id.* p. 395). Certainly, "construing the testimony most favorably in support of this finding," as this Court is "re-

quired to do" (*Chatz v. Armour Plant Employee's Credit Union*, 154 F. 2d 236, 240 (C. C. A. 7th) it cannot be said that the Record in this case does not support the finding of the Court below that Conway rented apartment 609 on a monthly basis. If this Court construes the testimony in favor of the finding and gives "great weight" to that finding, it cannot be said that this Court is "left with the definite and firm conviction that a mistake has been committed."

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

ED DUPREE,
General Counsel.

HUGO V. PRUCHA,
Assistant General Counsel.

FRANCIS X. RILEY,
Special Litigation Attorney,
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Office of the General Counsel,
Temporary "E" Building, 4th Street and
Adams Drive SW., Washington 25, D. C.

APPENDIX

THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county

in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court:

(a) *Effect*.—In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its con-

clusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

No. 11939

United States
Circuit Court of Appeals
For the Ninth Circuit.

DIVISION OF LABOR LAW ENFORCEMENT,
STATE OF CALIFORNIA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy
of the Estate of C. A. Reed Furniture Com-
pany, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

AUG 5- 1948

PAUL P. O'BRIEN, /

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Amendment to Order of January 8, 1948 (Allowing as Portion of the Prior Labor Claims the Deductions Made by the Employer for Union Dues Which Were Not Forwarded to the Union)	30
Appellant's Statement of Points, Rule 19(6) ..	45
Certificate of Clerk	43
Names and Addresses of Attorneys	1
Notice of Appeal	41
Notice of Hearing on Objections to Claim of G. O. Thrailkill	42
Order Affirming Order of Referee	39
Order Determining Extent of Priority of Employee's Claims	4
Petition for Review of Referee's Order Determining Extent of Priority of Employees' Claims	32
Proof of Unsecured Debt in Bankruptcy (Priority)	2
Referee's Certificate on Review	37

Stipulation to Supplement Record.....	6
Agreement Between C. A. Reed Furniture Co. and Upholsterers' International Union of North America.....	8
Agreement Between C. A. Reed Furniture Co. and Furniture Workers Union, Local No. 3161, and Los Angeles County Dis- trict Council of Carpenters.....	17

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 45,102—PH

In the Matter of
C. A. REED FURNITURE COMPANY,
a corporation,

Bankrupt.

PROOF OF UNSECURED DEBT IN
BANKRUPTCY (PRIORITY)

At Los Angeles, in said District of California, on the 11th day of September, 1947, came G. O. Thrailkill, as Supervisor of the Los Angeles Office of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California of Los Angeles, in the County of Los Angeles, in said District of California, and made oath and said:

That C. A. Reed Furniture Company, a corporation, against whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Division in the sum of Nine Thousand Fifty-Three and 52/100 Dollars (\$9,053.52); that the consideration of said debt is as follows:

Wages earned within three months before the commencement of proceedings herein, for which priority is claimed under Section 64a (2) of the

United States Bankruptcy Law, by the persons listed in the attached exhibit, marked "Exhibit A," which is hereby referred to and made a part hereof as if here set forth in full; and that all of the said persons listed in said exhibit have duly assigned in writing their said claims for labor and services to the [5] Chief of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, to collect under the authority vested in him by the laws of said State; that John F. Dalton is the duly appointed, qualified, and acting Chief of said Division, and that under and by virtue of the laws of said State, affiant is the duly authorized person to act for and on behalf of the said John F. Dalton and to file this claim; that said Division is now the sole owner and holder of said claim; that no part of said sum of \$9,053.52 has been paid; that there are no setoffs nor counterclaims to the same; that deponent has not, nor has anyone by his order, or to his knowledge or belief for his use, had or received any manner of security whatever for said debt.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

/s/ G. O. THRAILKILL,
Supervisor, Los Angeles Office, Division of Labor
Law Enforcement, Department of Industrial
Relations, State of California.

Subscribed and sworn to before me this 11th day of September, 1947.

/s/ MARGUERITE REESE,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires June 15, 1951.

[Endorsed]: Filed Feb. 5, 1948. [6]

[Title of District Court and Cause.]

ORDER DETERMINING EXTENT OF PRIORITY OF *OF* EMPLOYEE'S CLAIMS

The claim for compensation of certain employees recited in the attached summary marked "Exhibit A," having come on for hearing on the 16th day of December, 1947, before the Honorable Hubert F. Laugharn, evidence having been taken and the court being fully advised in the premises; and it appearing that the claims of the employees listed in the attached summary marked "Exhibit A" are entitled to a priority for wages due including show-up time for Wednesday, May 21, 1947, as specifically shown in said summary; and it further appearing that the claims for vacation wages earned are entitled to a priority for the period representing the three months preceding the filing of the petition in bankruptcy, the remaining wages that have accrued being allowed only as a general claim; and it further appearing that the union dues deducted by the bankrupt from the wages of the employees marked in "Exhibit A" should not

be allowed as a prior claim but only as a general claim. [22]

Now Therefore, It Is Ordered, as to each employee whose name is shown on "Exhibit A," attached hereto, that there be allowed as a prior claim as wages and compensation for each such employee the amount shown under the column on said "Exhibit A" entitled "Amt. Due Under Priority" totaling \$5,542.61; that there be allowed as a general claim on account of each such employee the amounts shown on said "Exhibit A" under the columns entitled "Unpaid Vacation" totaling \$2,880.58 and "Union Dues" totaling \$242.50.

It Is Further Ordered that the sums to be withheld and paid as Federal Old Age Benefits, Security and Unemployment Taxes and Withholding Taxes on account of each such employee's salary are set forth on "Exhibit A" under the columns entitled "Less FOAB-SURC" totaling \$128.30 and "W/Tax" totaling \$614.70; that such amounts be paid directly to the taxing authority involved in the order of priority as prescribed by the Bankruptcy Act (Sec. 104 Title 11, U.S.C.A.). And the trustee is directed to make disbursement in accordance herewith.

Dated: January 8, 1948.

/s/ HUBERT F. LAUGHARN,
Referee.

[Endorsed]: Filed Feb. 5, 1948 [23]

[Title of District Court and Cause.]

STIPULATION TO SUPPLEMENT RECORD

It Is Hereby Stipulated that the Record and Referee's Certificate on Review in connection with his Order of January 8, 1948 in the above entitled matter be, and the same hereby is, supplemented by inclusion in the record of the union contracts between the bankrupt above and the unions designated in the said contracts, which union contracts were in full force and effect during the period covered by the wage claims of the former employees of the above bankrupt. The aforesaid union contracts are attached herewith.

Dated: Jan. 28, 1948.

JAMES A. McLAUGHLIN and
FRANK C. WELLER,

Attorneys for Trustee,

By /s/ JAMES A. McLAUGHLIN.

Dated: Jan. 28, 1948.

PAULINE NIGHTINGALE and
EDWARD M. BELASCO,

Attorneys for Division of
Labor, etc.,

By /s/ EDWARD M. BELASCO.

It is so ordered Jan. 29/48.

/s/ HUBERT F. LAUGHARN,
Referee in Bankruptcy.

Certificate and Acknowledgement

This Is to Certify That I, M. M. Saxton, a stenographer in the Los Angeles Office of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, have prepared the attached copy of Agreement dated November 16, 1945 by and between C. A. Reed Furniture Company, its successors or assigns, party of the first part, and the Upholsterers' International Union of North America Local Union No. 15, Agent, and Wage Scale attached, from an executed copy of said Agreement and said Wage Scale; that I have accurately compared said copies attached with said executed copy of said Agreement and Wage Scale of which the attached are copies, and that the same are full, true and correct copies of said executed copies of said Agreement and Wage Scale.

In Witness Whereof, I have hereunto set my hand and have caused the Seal of the Department of Industrial Relations of the State of California to be affixed hereto this 28th day of January, 1948.

(Seal of Department of Industrial Relations, State of California.)

/s/ M. M. SAXTON.

State of California,
County of Los Angeles—ss.

On this 28th day of January, 1948, before me, Marguerite Reese, a Notary Public in and for said County and State, residing therein, duly commis-

sioned and sworn, personally appeared M. M. Saxton, known to me to be the person whose name is subscribed to the foregoing Certificate and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

(Notarial Seal)

/s/ MARGUERITE REESE,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires June 15, 1951. [25]

AGREEMENT

This Agreement, made this 16th day of November, 1945, by and between C. A. Reed Furniture Company, its successors or assigns, party of the first part and hereinafter referred to as the Employer, and the Upholsterers' International Union of North America, party of the second part, through its agent, Local Union No. 15 affiliated with the American Federation of Labor, and hereinafter referred to as the Union.

Witnesseth

The parties hereto agree to the following:

I.

The general purpose of this Agreement is to maintain harmony, cooperation, and understanding between the Employer and the Union; to provide efficient and economical operation of the Employer's plant; also for the protection of the plant and

property, and the rights and privileges of the Union Members.

II.

The Employer recognizes the Union as the sole and exclusive bargaining agency of all its production employees in the upholstery and allied departments, agrees to not bargain with its employees individually or collectively, to vary the terms of this Agreement. The Employer agrees to recognize the Shop Steward appointed by the Union as the Union's Representative in the Employer's factory. The Business Representative of the Union shall have free access to the Employer's factory by permission through the office of the Employer.

III.

The Employer agrees to employ only members in good standing in the Union, at all times, for all work covered by the jurisdiction of the Union, and that all employes, including apprentices, shall be hired from and through the office of the Union.

In the event the Union is unable to furnish sufficient help from its membership within forty-eight (48) hours after requested by the Employer, the Employer may hire from other sources, provided such persons hired obtain work permits from the Union before starting to work.

IV.

No member of the Union shall be discharged, or in any way discriminated [26] against for Union activity, or on account of any complaint or testimony given by him at any hearing, provided such

activity, complaint, or testimony is in accordance with the terms of this Agreement.

V.

All present employees, and all employees hired in the future that have worked one (1) month or more shall be considered as steady employees, unless otherwise mutually agreed to at the time of hiring.

All work shall be divided as nearly equally as possible among the steady employees regardless of seniority, in order to avoid discrimination.

Overtime work shall be divided as equally as possible and shall be paid at the rate of time and one-half.

VI.

If an employee fails to report for work for three consecutive days, the Union shall be notified by the Employer; the employee then failing to report for work within two days, shall be considered as having quit.

The Employer shall have the right to discharge any employee for drunkenness on the job, dishonesty, or failure to observe safety or sanitary rules, or house rules which have been mutually agreed upon by the Employer and the Union, and shall have been conspicuously posted.

Any employee reporting for work upon order of the Employer and not put to work for any reason except fire, accident, breakdown, or other unavoidable cause, shall receive four (4) hours pay for that day. Failure to notify an employee not to work shall be considered an order to report for work.

No member of the Union shall be required to work under any conditions which may be, or tend to be, unsafe, or injurious to health, morals, or reputation.

VII.

Vacation

The Employer's established personnel covered by this Agreement who have been in the employ of the Employer for one year, or more, and who have been in continuous good standing of the Union, shall receive a week's vacation with forty (40) hours' pay at the wage rate prevailing immediately prior to the vacation. Such vacation shall be taken at a time mutually agreeable to the [27] employee and the Employer. Employees with five years' service shall receive two weeks' vacation with pay.

VIII.

Any dispute between the parties hereto, or between the Employer and any Employee, shall be adjusted by direct negotiation between the Union and the Employer. Any such adjustments shall be retroactive as of the date the dispute took place.

Any situation not covered by this Agreement shall first be taken up with the Union before any action is taken by the Employer or any employee.

No employee shall be discharged, nor shall there be any cessation of work before the dispute has been taken up with representatives of the Union.

IX.

If the members who are subject to this Agreement are withdrawn upon the order of the Union's

International Officers or of a Central Organization with which they are affiliated, it shall not be considered a violation of the Agreement.

X.

The working day shall begin at 7:00 a.m. and shall end at 3:30 p.m. All work performed before starting time or after quitting time shall be considered as overtime. The work week shall consist of five days of eight hours each, Monday through Friday inclusive.

Work performed on Saturdays shall be paid at the rate of time and one-half. Sundays, or the following holidays: New Year's, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, or Christmas Day, double the regular rate shall be paid. There shall be no work on Labor Day, except to save life or property.

XI.

In case of inflation, war, or national emergency, the wage and hour clauses may be opened for discussion or revision upon giving 30 days' written notice. Consideration shall be given for merchandise contracts made before such inflation took place. [28]

Any steady employee, who enters into war service for the United States, shall not lose his standing or rights, and shall have the time spent by him in such war service added to his length of service for the Employer.

Any such employee who within sixty (60) days of his release or discharge from such war service, applies to the Employer, through the Union for rein-

statement, shall be reinstated to his former position in accordance with the seniority provisions of this contract, or, if physically incapable of performing the work of that position, shall be assigned to some then existing position whose work he is able to perform.

XII.

Copies of this Agreement shall be furnished by the Union, and shall be conspicuously posted in each department covered by this Agreement.

Wage Scale

This schedule of classified minimum hourly rates shall become part of the working agreement made and entered into between C. A. Reed Furniture Company of Los Angeles, California, and the Upholsterers' International Union of North America, Local Union No. 15, this 16th day of November, 1945. Workers now employed and receiving a higher rate than the minimum hourly rates listed herein shall not have their rates reduced during the life of this Agreement.

I.

In the event that an employee is performing work that cannot be properly classified under the classified minimum wage rates below, or that has been omitted from the list, and in the case of a new operation being created and not listed, it is understood and agreed that a rate to cover such work will be agreed upon by the Employer and the Union.

II.

If a second shift is required, they shall receive ten per cent (10) over the regular hourly day rate.

III.

Apprentices shall receive .80c per hour for the first three months of their apprenticeship and an increase of not less than 05c per hour each three months thereafter, until the journeyman rate for their respective classification is reached. [29]

Apprentices shall attend a school that has been approved by the Union, and in accordance with the Union's laws.

Not more than one apprentice shall be employed to each five journeymen. In all other respects this agreement applies to journeymen and apprentices alike.

Wage Scale

The following are minimum rates of pay.

Upholsterers	\$1.60	per hour
Cutters	\$1.60	"
Cushion Makers.....	\$1.60	"
Springers	\$1.50	"
Seamstresses	\$1.10	"
Outsiders	\$1.50	"
Floorboys	\$.80	"
Laborers	\$.80	"

It is understood and agreed that in the event an employee is working on piecework, that the average piecework earnings of said employee shall be the basis for computing overtime, day work, and vacation pay.

This agreement shall remain in full force and effect until September 1, 1946, and shall continue thereafter until either party wishes to change, amend, or terminate. Notice of desire to change, amend, or terminate, shall be given by either party sixty (60) days prior to September 1, of any year following; or the Agreement shall be considered renewed for another year, and so on annually.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this 16th day of November, 1945.

UPHOLSTERERS' INTERNATIONAL UNION
OF N. A. LOCAL UNION No. 15, Agent,

By /s/ CHAS. L. YOST,
Business Representative.

C. A. REED FURNITURE
COMPANY,
Company.

By /s/ C. A. REED,
President.

By /s/ M. N. STEWART,
Vice-President. [30]

Certificate and Acknowledgment

This Is to Certify That I, Margaret Morris, a stenographer in the Los Angeles Office of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, have prepared the attached copy of Agreement dated September 25, 1946, by and between C. A. Reed Furniture Co. and Furniture

Workers Union, Local No. 3161, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Supplement thereto, from an executed copy of said Agreement and said Supplement; that I have accurately compared said copies attached with said executed copy of said Agreement and Supplement thereto of which the attached are copies, and that the same are full, true and correct copies of said executed copies of said Agreement and Supplement thereto.

In Witness Whereof, I have hereunto set my hand and have caused the Seal of the Department of Industrial Relations of the State of California to be affixed hereto this 28th day of January, 1948.

[Seal of Department of Industrial Relations,
State of California.]

/s/ MARGARET MORRIS.

State of California,
County of Los Angeles—ss.

On this 28th day of January, 1948, before me, Marguerite Reese, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Margaret Morris, known to me to be the person whose name is subscribed to the foregoing Certificate and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Notarial Seal] MARGUERITE REESE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires June 15, 1951. [31]

G-46

AGREEMENT

This Agreement, made and entered into this 25th day of Sept., 1946, by and between C. A. Reed Furniture Co., hereinafter called the "Company," and Furniture Workers Union, Local No. 3161, and the Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, American Federation of Labor, hereinafter called the "Union":

Witnesseth:

Article I.

The general purpose of this agreement is to maintain harmony, cooperation and understanding between the Company and the Union, to provide efficient, economical operation of the Company's plant, also for the protection of the plant and property, and the rights and privileges of the Union members.

Article II.

The Company recognizes the Union as the sole and exclusive bargaining agency of all its produc-

tion and maintenance employees, exclusive of office workers, teamsters, and watchmen, and agrees to not bargain with its employees individually or collectively, to vary the terms of this agreement. The Company agrees to recognize the Shop Steward appointed by the Union as the Union's Representative in the Company's factory, said Shop Steward shall have been in the employ of the Company for a period of not less than one (1) year. The Business Representative of the Union shall have free access to the Company's factory, after contacting the authorized representative of the Company through the office.

Article III.

The Company agrees that all production and maintenance employees including working foremen shall at all times be members in good standing of the Union, and all such employees shall be employed through the office of the Union. If the Union is unable within forty-eight (48) hours to furnish [32] competent help, the employer may employ help from the open market, but such new help shall first obtain work permits from the office of the Union. Employees who are holders of work permits after passing a probationary period of fifteen (15) working days, and having proven satisfactory, must make application and join the Union within the next fifteen (15) working days, or be released from employment.

Article IV.

No member of the Union shall be discharged, or in any way discriminated against for Union activ-

ity, or on account of any complaint or testimony given by him at any hearing.

Article V.

(a) In reducing personnel because of lack of work, or other legitimate cause, the oldest man on the job shall be the last man laid off, providing he can qualify. In returning men to work, the last man laid off shall be the first man returned to the job. The seniority list shall be drawn up and kept by representatives of the Company and the Local Union, and shall at all times be open to all such representatives. The Company may at any time divide work as alternative to reducing the number of employees. All employees on the seniority list who are laid off shall be notified to return to work through the Local Union before new men are employed. The employer shall have the right to discharge any employee for insubordination, drunkenness, incompetency, dishonesty, or failure to perform work as required or to observe safety or sanitary rules or regulations and the employer's house rules, which must be conspicuously posted. The employer shall have the right to discharge any employee for any reasonable cause during the probationary period which is hereby set at fifteen (15) working days.

(b) Upon request of the Union or the Shop Committee, the Company agrees to show cause for discharge, of any employee of the established personnel, and if after a review of the case it is shown that such employee was discharged unjustly

or for Union activities, he shall be promptly reinstated. [33]

(c) If an employee fails to report for work for three (3) consecutive days, the Union shall be notified by the Employer; the employee then failing to report for work within two (2) days unless because of sickness or other legitimate cause shall be considered as having quit.

(d) Any employee reporting for work upon order of the Company and not put to work for any reason except fire, accident, breakdown, or other unavoidable cause, shall receive four (4) hours' pay for that day. Failure to notify an employee not to report for work shall be considered an order to report for work.

(e) No member of the Union shall be required to work under any conditions which may be, or tend to be, unsafe, or injurious to health, morals or reputation.

Article VI.

Any employee entering the United States Army, Navy, Marine Corps, or the National Guard shall be entitled to reinstatement to his former, or an equivalent, position without loss of seniority rating in accordance with Federal and State laws.

Article VII.

(a) Each employee shall receive one (1) weeks vacation after one (1) year of service with the Company and two (2) weeks vacation after three (3) years of service with the Company, except that this liberalized vacation benefit shall not apply to

those employees who have taken their 1946 vacations.

(b) Vacations shall be taken during July, August, or September and vacation pay shall be computed at any time it accrues during that period.

(c) Employees who are returned veterans and who worked for the Company prior to going into the Armed Forces shall be granted vacation credits for their time in the Armed Forces as follows:

(1) The time the employee was in the Armed Forces shall be added to the time the employee has worked for the Company only to determine whether the employee is entitled to one week or two weeks vacation for purposes of Article VII (a). [34]

(2) Any unused vacation credit for time accumulated when working for the Company prior to induction in the Armed Forces shall be added to vacation credits for time worked since returning to work for the Company when computing eligibility for vacations.

(3) Nothing in this article shall be construed to mean that an employee would be entitled to a vacation upon returning to work based upon the time spent in the Armed Forces.

(d) Week's vacation as used herein is understood to be 40 hours times the straight time hourly rate at the time vacation is due.

(e) In the event an employee has worked a full year for the Company and then terminates

his employment, he shall be entitled to receive his earned vacation pay. There shall be no pro-rata vacation.

Article VIII.

On and after July 1, 1946, the minimum wage paid by the Company to all production and maintenance employees shall be set forth in the wage scale which is attached hereto and made a part hereof, which is understood to set forth minimum rates of hourly pay. Wages shall be paid weekly.

Article IX.

There shall be elected by the employees of the Company who are members of the Union a committee to be known as the "Shop Committee." In order to be eligible to membership on such committee an employee must have been employed by the Company not less than six (6) months. The severance of the connection of any member of the committee as an employee of the Company shall automatically terminate his position on such committee.

The Business Representative of the Union is to be recognized as a member of the Shop Committee and may sit in at any and all meetings.

The Company shall have a committee of its own choosing made up from its officers, superintendents, office executives or foremen, to confer and negotiate with the Shop Committee.

The purpose of the two Committees herein mentioned shall be to consider and, if possible, adjust all grievances which may arise between the [35]

parties of this agreement, but said Committees shall not have the power to negotiate changes in this agreement or give notice of extension or termination of this agreement.

If the Committees are not able, within a period of five (5) days after the grievance has been presented to the Company, or such other period as the parties may agree upon, to settle the grievance satisfactorily, either party may request arbitration. In the event arbitration is requested, each party shall, within three (3) days of such request, submit a name of an arbitrator, and the two arbitrators so selected shall choose a third. In the event that the two arbitrators cannot agree upon a third arbitrator within three (3) working days, the third arbitrator shall be appointed by the American Arbitration Association. The matter shall be heard by such Board of three arbitrators and the decision of the Board shall be final and binding upon both of the parties. Any costs of the arbitration shall be borne equally.

There shall be no cessation of work declared by either party during this process of arbitration, and a decision shall be rendered within ten days by the Board of Arbitration.

Article X.

Pay for holidays shall be as follows:

- (a) Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and New Year's Day, if worked, shall be paid at double the straight time rate of pay.

- (b) No work shall be performed on Labor Day except to protect life or property.
- (c) It is agreed that if any of the above-named holidays fall upon a Sunday, they shall be observed the following Monday.
- (d) Employees shall receive pay for the above-mentioned holidays at the straight time rate if not worked and these holidays shall be counted as days worked for the purpose of computing overtime.
- (e) As a consideration for granting the above-mentioned six (6) holidays with pay when not worked, the Company reserves the right to grant only such rest periods as are required by the State Division of Industrial Welfare. [36]

Article XI.

This agreement shall remain in full force and effect until July 1, 1947, and shall continue thereafter until either party wishes to change, amend or terminate. Notice of desire to change, amend or terminate shall be given by either party thirty (30) days prior to July 1, 1947, or of any year following, or the Agreement shall be considered renewed for another year, and so on annually. Due to unsettled economic conditions prevailing at the time of the execution of this Agreement, it is hereby agreed that either party may, on Thirty (30) days' notice reopen this Agreement for renegotiation of wage rates only, and that there shall be no more than one (1) such reopening for wage rate nego-

tations prior to July 1, 1947, or during any contract year thereafter during the life of this Agreement.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

C. A. REED FURNITURE CO.,
By C. A. REED,
Pres., "Company."

FURNITURE WORKERS UNION, LOCAL No.
3161, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA,
A. F. OF L.

By ROY TAYLOR,
Business Representative. [37]

Supplement to Agreement dated, 1946, by and between the C. A. Reed Furniture Company, hereinafter called the "Company," and Furniture Workers Union, Local No. 3161, and the Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, A.F.L., hereinafter called the "Union."

Wage Scale

This schedule of classified minimum hourly rates shall become part of the existing working agreement made and entered into between the Company and the Union on this date. Workers now employed and receiving a higher rate than the minimum hourly rates listed herein shall not have their rates reduced during the life of this Agreement.

- (b) No work shall be performed on Labor Day except to protect life or property.
- (c) It is agreed that if any of the above-named holidays fall upon a Sunday, they shall be observed the following Monday.
- (d) Employees shall receive pay for the above-mentioned holidays at the straight time rate if not worked and these holidays shall be counted as days worked for the purpose of computing overtime.
- (e) As a consideration for granting the above-mentioned six (6) holidays with pay when not worked, the Company reserves the right to grant only such rest periods as are required by the State Division of Industrial Welfare. [36]

Article XI.

This agreement shall remain in full force and effect until July 1, 1947, and shall continue thereafter until either party wishes to change, amend or terminate. Notice of desire to change, amend or terminate shall be given by either party thirty (30) days prior to July 1, 1947, or of any year following, or the Agreement shall be considered renewed for another year, and so on annually. Due to unsettled economic conditions prevailing at the time of the execution of this Agreement, it is hereby agreed that either party may, on Thirty (30) days' notice reopen this Agreement for renegotiation of wage rates only, and that there shall be no more than one (1) such reopening for wage rate nego-

tiations prior to July 1, 1947, or during any contract year thereafter during the life of this Agreement.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

C. A. REED FURNITURE CO.,
By C. A. REED,
Pres., "Company."

FURNITURE WORKERS UNION, LOCAL No.
3161, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA,
A. F. OF L.

By ROY TAYLOR,
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Supplement to Agreement dated, 1946, by and between the C. A. Reed Furniture Company, hereinafter called the "Company," and Furniture Workers Union, Local No. 3161, and the Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, A.F.L., hereinafter called the "Union."

Wage Scale

This schedule of classified minimum hourly rates shall become part of the existing working agreement made and entered into between the Company and the Union on this date. Workers now employed and receiving a higher rate than the minimum hourly rates listed herein shall not have their rates reduced during the life of this Agreement.

Article I.

Overtime rates of time and one-half shall be paid for more than eight (8) hours in any one day, and on Saturdays, and for work exceeding forty (40) hours in any calendar week. The regular work week shall be Monday to Friday, inclusive. Overtime rates of double time shall be paid for more than ten (10) hours' work in any one day.

Article II.

In the event that no employee is performing work that cannot be properly classified under the classified minimum wage rates below, or that has been omitted from the list, and in the case of a new operation being created and not listed, it is understood and agreed that a rate to cover such work will be agreed upon by the Company and the Union.

Article III.

Helpers in all departments of the Company's factory shall receive not less than the minimum hourly wage as set forth in the following classified rates.

A helper shall be defined as a person directly helping someone, such as, offbearer, assisting spray man, dolly boys, etc. No helper shall be permitted to perform any operation involved in actual production or where they are responsible for any act of actual production work. [38]

Article IV.

Employees working on a night shift shall receive ten per cent (10%) over the regular hourly day rate.

Article V.

The following amendments from previous contract are incorporated herein and made a part of this Agreement:

- (1) Men moving to a higher paid job in the same factory are to be raised five (5) cents when changed, and every thirty (30) days until the higher rate is reached.
- (2) Union to recognize and agree to any combined rates established by mutual agreement after the effective date of this contract.

Article VI.

MILL ROOM

Bracket #1

Spindle Carver	\$1.65½
Automatic Lathe Set Up	1.43½
Double End Tenoner	1.43½
Hand Turner	1.43½
Sticker Men	1.43½
Band Sawyer	1.43½
Millwright	1.43½
Detail Trim Sawyer	1.43½
Sample Maker	1.43½
Shaperman	1.43½
Pattern Maker	1.43½
Onsrud Waterfall Router	1.43½
Maintenance Men(Millwright, Electrician, etc.)	1.43½
Saw Filer	1.43½
Knife Grinder	1.43½
Multiple Carver	1.43½

Bracket #2

Trim Sawyer	1.31½
Mould Sanders	1.31½
Stock Cutters	1.31½
Veneer Clipper	1.31½

A minimum rate of one dollar and twenty-one and one-half (\$1.21½) shall be maintained in the mill and veneer departments for all others who operate, feed, or set up machines, including glue man and millwright helpers.

CABINET DEPARTMENT

Bracket #1

First Class Cabinet Makers	1.43½
Sample Makers	1.43½
Repair Man (1st Class)	1.43½

Bracket #2

Drawer Fitters	1.21½
Inspectors	1.21½
Door Hangers	1.21½
Case Clamp	1.21½
Assemblers—Major	1.21½
Clamp Men	1.19½
Frame Makers	1.21½
Repair Man (2nd Class)	1.21½

Bracket #3

Putty Men	1.00½
Bed Rail Men	1.00½
Hand Sanders	1.05½
Assemblers—Minor	1.05½
Slip Seat Makers	1.10½

FINISHING DEPARTMENT

Bracket #1

Spray Men	1.43½
Burn-In Men	1.43½
Touch-Up Men	1.43½

Bracket #2

Spray Men (Stain)	1.25½
Spray Men (Under Coat)	1.25½

Bracket #3

Decorators	1.21½
Polishers	1.21½
Rubbers	1.21½
Spray Men (Filler)	1.21½

Bracket #4

Stripers	1.06½
Toners	1.06½
Over-Glaziers	1.06½
Blenders	1.06½
Highlighters	1.06½
Antiquers	1.06½
Hand Sanders	1.05½
Filler Wipers	1.05½

SHIPPING DEPARTMENT

Bracket #1

Checkers	1.19½
Glass Assemblers	1.19½
Receiving Stock Clerk	1.19½
Load Assemblers	1.17½
Craters and Packers	1.17½
Helpers in all Departments	1.00

GLASS DEPARTMENT

Glass Men—Journeyman	1.43½
Glass Men	1.31½
Glass Helpers	1.00

Lead Men and Pivot Men shall receive a minimum of five (5c) cents per hour more than the highest paid men working under them.

Employees receiving premium rates shall receive an increase of ten cents (10c) on their premium rates in lieu of the rates set forth above, but in no event less than these rates.

Article VII.

This wage scale shall become effective July 1, 1946, and shall remain in full force and effect until July 1, 1947, and thereafter, unless modified as provided for by Article XI of the Agreement between the parties.

In Witness Whereof the parties hereto have set their hands and seals this day of, 1946.

C. A. REED FURNITURE CO.,
By /s/ C. A. REED,
Pres., Company.

FURNITURE WORKERS UNION, LOCAL No.
3161, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA,
A. F. OF L.

By /s/ ROY TAYLOR,
Business Representative.

LOS ANGELES COUNTY DISTRICT COUNCIL
OF CARPENTERS, UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS
OF AMERICA, A. F. OF L.

By,
"Union."

[Endorsed]: Filed Feb. 5, 1948. [41]

[Title of District Court and Cause.]

AMENDMENT TO ORDER OF JANUARY 8,
1948 (ALLOWING AS PORTION OF THE
PRIOR LABOR CLAIMS THE DEDUC-
TIONS MADE BY THE EMPLOYER FOR
UNION DUES WHICH WERE NOT FOR-
WARDED TO THE UNION)

An order was made herein on January 8, 1948, allowing as general claims to the various employees of the above bankrupt the funds deducted from the employees' pay as union dues but which amounts

were not forwarded to the union. The said employees had contended here that the said amounts should be allowed to them as prior claims.

Subsequent to making the order it appears that the Trustee took over more funds in cash assets than the amount of the said deductions and that the same in fact can be followed into the said funds, and the Referee being fully advised in the premises therefor makes the following order:

It Is Ordered that the portion of the order heretofore made by the Referee herein on January 8, 1948, allowing as general claims the union dues deducted from the employees' pay checks and not paid by the bankrupt to the union, be, and the same hereby is, amended, and it is ordered that the said dues so deducted and held by the bankrupt are allowed to the said employees as prior [42] claims. The said union dues so deducted are in accordance with the schedule attached to the said order of January 8, 1948.

Dated: February 4, 1948.

/s/ HUBERT F. LAUGHARN,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 5, 1948. [43]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER DETERMINING EXTENT OF
PRIORITY OF EMPLOYEES' CLAIMS

Comes now the Division of Labor Law Enforcement, State of California, by and through its attorneys, Pauline Nightingale and Edward M. Belasco, and files this, its Petition For Review of that certain Order made by Referee in Bankruptcy, Hubert F. Laugharn, Esquire, and entered into the above-entitled proceeding on January 8, 1948, sustaining the objections of Paul W. Sampsell, Trustee in Bankruptcy, herein, to the allowance of priority status to certain portions of your Petitioner's claim in bankruptcy as statutory assignee of designated wage claimants, the former employees of the bankrupt above, said claim being entitled Proof of Unsecured Debt in Bankruptcy (Priority); that the said Order eliminates from priority status under Section 64(a) of the Bankruptcy Act, as amended, all the vacation wages earned by such wage claimants and union dues deducted within three months prior to the filing of the petition in bankruptcy from the wages of said wage claimants under union checkoff systems, but not paid to the respective unions by the bankrupt above; that said vacation wages, other than one-fourth ($\frac{1}{4}$) thereof, and said union dues were allowed only as general unsecured claims. [44]

Said Order reads as follows, to wit:

“The claim for compensation of certain employees recited in the attached summary

marked 'Exhibit A,' having come on for hearing on the 16th day of December, 1947, before the Honorable Hubert F. Laugharn, evidence having been taken and the court being fully advised in the premises; and it appearing that the claims of the employees listed in the attached summary marked 'Exhibit A' are entitled to a priority for wages due including show-up time for Wednesday, May 21, 1947, as specifically shown in said summary; and it further appearing that the claims for vacation wages earned are entitled to a priority for the period representing the three months preceding the filing of the petition in bankruptcy, the remaining wages that have accrued being allowed only as a general claim; and it further appearing that the union dues deducted by the bankrupt from the wages of the employees marked in 'Exhibit A' should not be allowed as a prior claim but only as a general claim.

"Now, Therefore, It Is Ordered, as to each employee whose name is shown on 'Exhibit A,' attached hereto, that there be allowed as a prior claim as wages and compensation for each such employee the amount shown under the column on said 'Exhibit A' entitled 'Amt. Due Under Priority' totaling \$5,542.61; that there be allowed as a general claim on account of each such employee the amounts shown on said 'Exhibit A' under the columns entitled 'Unpaid Vacation' totaling \$2,880.58 and 'Union Dues' totaling \$242.50.

“It Is Further Ordered that the sums to be withheld and paid as Federal Old Age Benefits, Security and Unemployment Taxes and Withholding Taxes on account of each such employee’s salary are set forth on ‘Exhibit A’ under the columns entitled [45] ‘Less FOAB-SURC’ totaling \$128.30 and ‘W/Tax’ totaling \$614.70; that such amounts be paid directly to the taxing authority involved in the order of priority as prescribed by the Bankruptcy Act (Sec. 104, Title 11, U.S.C.A.), and the trustee is directed to make disbursement in accordance herewith.

“Dated: January 8, 1948.

/s/ HUBERT F. LAUGHARN,
Referee.”

The “Exhibit A” is attached below, and it is acknowledged by your Petitioner as a correct monetary breakdown of the wages involved herein.

I.

The Referee in Bankruptcy erred in ordering that the objections of the Trustee to the claim of the Division of Labor Law Enforcement, State of California, be sustained and that all of the vacation wages earned and the union dues collected under the checkoff system be disallowed as a priority claim.

II.

The Referee in Bankruptcy erred in basing his Order on the assumption that claims for vacation wages earned are entitled to priority only for that

portion represented by the period worked within three months prior to the date of the filing of the Petition in Bankruptcy.

III.

The Referee in Bankruptcy erred in making his Order in that he did not conclude as a matter of law that under the terms of the union contracts involved herein, copies of said contracts being made a part of the record of this proceeding by virtue of the Stipulation to Supplement Record, the vacation wages earned by the wage claimants were not severable, and all of the said vacation wages were earned and became due within three months prior to the date of the filing of the Petition in Bankruptcy herein.

IV.

The Referee in Bankruptcy erred in making his Order in that he did not [46] conclude as a matter of law that the bankrupt herein, when it deducted from the wages of its employees certain sums as union dues under the existing checkoff systems and retained said sums, failing to pay them to the respective unions, the bankrupt became trustee of the money collected on behalf of and for the benefit of its employees; that since the said sums deducted came from wages earned by the wage claimants within three months prior to the date of the filing of the Petition in Bankruptcy, the said wages deducted had priority status under the provisions of Section 64(a) of the Bankruptcy Act, as amended.

V.

The Referee in Bankruptcy erred in failing to order that all the vacation wages earned by the wage claimants herein were entitled to priority status under Section 64(a) of the Bankruptcy Act, as amended, in that they were earned and became due within three months prior to the date of the filing of the Petition in Bankruptcy herein; and the Referee in Bankruptcy further erred in failing to order that the union dues deducted from the wages of the wage claimants earned within three months prior to the date of the filing of the Petition in Bankruptcy herein, and retained by the bankrupt herein and not turned over to the respective unions under the checkoff systems then in effect, were entitled to priority status under the provisions of Section 64(a) of the Bankruptcy Act, as amended.

Wherefore, your Petitioner prays that the said Order be reviewed and reversed, and a proper Order made giving the full vacation claims and the union dues claims priority status, and for such other and further relief, decrees and orders as shall be meet in the premises.

Dated: January 29, 1948.

Respectfully Submitted,

PAULINE NIGHTINGALE and
EDWARD M. BELASCO,

Attorneys for Petitioner,

By /s/ EDWARD M. BELASCO.

[Endorsed]: Filed Jan. 29, 1948. [47]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Peirson M. Hall, Judge of the
District Court of the United States, Southern
District of California, Central Division:

I, Hubert F. Laugharn, Referee in Bankruptcy
to whom the above-entitled matter has been re-
ferred, do hereby certify as follows:

I made an order on January 8, 1948, allowing a
large number of labor claims, most of which were
by members of a labor union which had a written
contract with the bankrupt. The said order of
allowance determined that the unpaid vacation pay
should be allowed as prior for that portion of the
year covering the three months' period prior to the
bankruptcy proceeding and that the balance of the
said vacation pay earned throughout the rest of
the year beyond the three months' period was enti-
tled to allowance only as a general claim. The said
order likewise provided that certain funds deducted
from the employees' pay checks for their union
dues and not remitted to the union by the bankrupt
would be allowed only as a general claim. [50]

Thereafter there was duly filed a Petition for
Review by the Division of Labor Law Enforcement
of the State of California.

Subsequent to the making of the said order of
January 8, 1948, a further and amended order was
made allowing to the said labor claimants the said
union dues, so deducted from their pay, as a prior
claim instead of a general claim. This accordingly
disposes of the said point on the review herein.

The question therefore presented is: "What Portion of the Unpaid Vacation Pay at the Date of Bankruptcy Should Be Allowed as Prior?"

The Trustee contended that the same should be pro-rated and that portion accruing or earned for the three months of the year immediately prior to bankruptcy would be "earned wages" within the priority period, and accordingly, would be entitled to priority, whereas the remaining portion would be general. The petitioner for review, representing the labor claimants, contends all of the vacation pay should be allowed as prior.

I determined the matter in accordance with the contention of the Trustee and followed the principles established in the case of *Public Ledger*, 161 Fed. 2d 762, 5th Circuit. The decision in this case was written by Judge Albert Lee Stephens of the 9th Circuit, who at the time was sitting with the 5th Circuit.

Section 64a(2) gives a priority for wages "which have been earned within three months." The earning of the vacation is distributed over the twelve months and in arriving at the "prior" portion of the vacation pay, the same may be pro-rated and that portion thereof as the three months represents is, in effect, earned within the said three months. The balance accordingly is allowed as a general claim. I followed the same principle in the case entitled *In the Matter of Sierra Rubber Company, Bankrupt*, [51] No. 44,733-W of this Court.

In compliance with the provisions of Section 39a (8), I attach to this Certificate the following:

- (1) Trustee's Objections to Priority and to Amount.
- (2) Order Determining Extent of Priority of Employees Claims.
- (3) Petition for Review of Referee's Order Determining Extent of Priority of Employees' Claims.
- (4) Amendment to Order of January 8, 1948.
- (5) Proof of Unsecured Debt in Bankruptcy.
- (6) Stipulation to Supplement Record.

Dated: February 5, 1948.

Respectfully submitted,

/s/ HUBERT F. LAUGHARN,

Referee in Bankruptcy.

[Endorsed]: Filed Feb. 5, 1948. [52]

[Title of District Court and Cause.]

ORDER AFFIRMING ORDER OF REFEREE

This matter came on to be heard on the petition of the Division of Labor Law Enforcement, State of California, claimant and statutory assignee of wage claimants who were former employees of the above-named bankrupt, for review of the Referee's order made on January 8, 1948, which said order was amended on February 4, 1948, by the said Referee, and the question presented by said Petition for Review being whether such employees of the bankrupt were entitled to assert priority under the provisions of Section 64a (2) of the Bankruptcy

Act (Title 11, U.S.C.A., Section 104) in their entirety as to their claims for compensation for vacations earned but not taken prior to the filing of the bankruptcy petition herein, or whether such claims for compensation were only entitled to priority as to the portion of such vacations earned within the three-month period preceding the filing of such bankruptcy petition, and the Referee having determined and ordered that such employees [55] were only entitled to assert priority as to the portion of such vacation compensation earned within the three months preceding the filing of the bankruptcy petition, and having determined and ordered that the balance of each of such claims for unpaid vacation compensation should be allowed as a general claim, but not as a prior claim, and the above-entitled court having duly considered the Petition for Review, the Referee's certificate on review, the stipulations of counsel on file, and the briefs on file, and the matter having been orally argued by counsel for the petitioner, and the court being fully advised in the premises and having determined that the order of the Referee is correct and that there is no basis for allowing priority to any of the said claims for vacation compensation earned prior to the three-month period preceding the filing of the bankruptcy petition, and having determined that the Referee allowed as prior claims all of the portions of the unpaid vacation compensation which were earned within the period of three months preceding the filing of said bankruptcy petition;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Referee's said order be and it is hereby affirmed.

Dated: April 12, 1948.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form:

PAULINE NIGHTINGALE and
EDWARD M. BELASCO,
By /s/ EDWARD M. BELASCO,
Attorneys for Petitioner.

[Endorsed]: Filed and Docketed Apr. 12, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Peirson M. Hall, Judge of the Above-Entitled Court; to the Honorable Hubert F. Laugharn, Referee in Bankruptcy of the Above-Entitled Court; to Edmund L. Smith, Clerk of said Court:

You and each of you will please take Notice, and Notice is hereby given, that the Division of Labor Law Enforcement, State of California, statutory assignee of certain prior wage claimants in the above-entitled bankruptcy proceeding, does hereby appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit from the Order Affirming Order of Referee, dated April 12, 1948, and entered in Civil Order Book 50, at Page 430, affirming in all respects the Order of the Referee in Bankruptcy, of January 8, 1948, as amended February 4, 1948.

Dated: May 3, 1948.

PAULINE NIGHTINGALE and
EDWARD M. BELASCO,

Attorneys for Division of Labor Law Enforcement,
State of California,

By /s/ EDWARD M. BELASCO.

[Affidavit of service by mail attached.]

[Endorsed]: Filed and Mailed Copy to James A. McLaughlin, et al., Attorneys for Trustee, May 3, 1948. [57]

[Title of District Court and Cause.]

NOTICE OF HEARING ON OBJECTIONS TO
CLAIM OF G. O. THRAILKILL

To G. O. Thrailkill, and to your Attorneys Edward M. Belasco and Pauline Nightingale:

You and each of you will please take notice that the Trustee in Bankruptcy herein has objected to the allowance of your claim both as to amount and priority, all as is more particularly set forth in the copy of such objection attached hereto and herewith served upon you.

You are further notified that a hearing on such objection will be had in the Courtroom of the Hon-

orable Hubert F. Laugharn, Referee in Bankruptcy in the Federal Building, 312 North Spring Street, Los Angeles, California, on the 16th day of December, 1947, at the hour of 2:00 o'clock p.m., or as soon thereafter as counsel can be heard.

Dated: December 5, 1947.

JAMES A. McLAUGHLIN and
FRANK C. WELLER

By JAMES A. McLAUGHLIN,
Attorneys for Trustee.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain full, true and correct copies of Debtor's Petition in Bankruptcy; Orders of Adjudication and of General Reference; Proof of Unsecured Debt in Bankruptcy (Priority); Trustee's Objections to Priority and to Amount; Claims of Employees Entitled to Priority, and the Amounts Thereof; Order Determining Extent of Priority of Employees' Claims; Stipulation to Supplement Record; Amendment to Order of January 8, 1948 (Allowing as Portion of the Prior Labor Claims the Deductions Made by the Employer for Union Dues Which Were Not Forwarded to the Union); Petition for Review of Referee's Order Determining Extent of Priority of Employees' Claims; Referee's Certificate on Review; Notice of Hearing on Petition for Review;

Order Affirming Order of Referee; Notice of Appeal; Appellants' Statement of Points; Appellants' Designation of the Record on Appeal and Appellee's Designation of Additional Portions of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$17.05 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of May, A.D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11939. United States Circuit Court of Appeals for the Ninth Circuit. Division of Labor Law Enforcement, State of California, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of C. A. Reed Furniture Company, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 25, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11939

DIVISION OF LABOR LAW ENFORCEMENT,
Department of Industrial Relations, State of
California,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy,
Etc.,

Appellee.

In the Matter of
C. A. REED FURNITURE COMPANY, a Corpo-
ration,

Bankrupt.

APPELLANT'S STATEMENT OF POINTS
RULE 19(6)

Comes now the Appellant, Division of Labor Law Enforcement, appearing on behalf of all prior wage claimants, and states that the Points upon which it intends to rely in the Appeal in this proceeding are as follows:

1. The Court erred in rendering its Order entered April 12, 1948, in which the Order of the Referee in Bankruptcy herein of January 8, 1948, as amended on February 4, 1948, was confirmed.

2. The Court erred in ruling as a matter of law that Appellant's assignors' vacation wages were

not entitled to full priority status as wages under Section 64a(2) of the Bankruptcy Act.

3. The Court erred in ruling as a matter of law that only one-fourth of the vacation wages of Appellant's assignors was entitled to priority status as wages under Section 64a(2) of the Bankruptcy Act.

4. The Court erred in not ruling as a matter of law that vacation wages under the provisions of the two union agreements herein were earned only after all conditions precedent required in the said union agreements were fully complied with by Appellant's assignors.

5. The Court erred in not ruling as a matter of law that the vacation wages claimed by Appellant's assignors were fully earned during the three months' period prior to the commencement of the bankruptcy proceeding.

6. The Court erred in failing to rule as a matter of law that the provisions for vacations with pay contained in the union agreements herein did not provide for pro rata earning of said vacations with pay, and that the Referee in Bankruptcy erred in pro rating the vacation wages on a one-fourth-three-fourths basis.

7. The Court erred in affirming the Referee's Order wherein it was held that three-fourths of the vacation wages earned by Appellant's assignors were only entitled to status as general claims.

The Appellant designates the following portions of the record, as certified by the District Court, as necessary to consider the Points above:

1. Proof of Unsecured Debt in Bankruptcy (Priority). (Exhibit "A" need not be part of the record, as Order Determining Extent of Priority of Employee's Claims, Dated January 8, 1948, contains an exhibit "A" which is a correct breakdown of the wage claims of Appellant's assignors.)

2. Notice of Hearing on Objections to Claim of G. O. Thrailkill.

3. Order Determining Extent of Priority of Employee's Claims, Dated January 8, 1948.

4. Stipulation to Supplement Record, including attached union contracts.

5. Petition for Review of Referee's Order Determining Extent of Priority of Employees' Claims. (Exhibit "A" need not be part of the record, as it is contained in the Order of January 8, 1948, listed above as number 3.

6. Amendment to Order of January 8, 1948 (Allowing as Portion of the Prior Labor Claims the Deductions Made by the Employer for Union Dues Which Were Not Forwarded to the Union.)

7. Referee's Certificate on Review.

8. Order Affirming Order of Referee.

9. Notice of Appeal, dated May 3, 1948.

Dated: June 4, 1948.

Respectfully submitted,

PAULINE NIGHTINGALE and

EDWARD M. BELASCO,

By /s/ EDWARD M. BELASCO,

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 7, 1948.

No. 11939

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF
CALIFORNIA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of C. A. Reed Furniture Company, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF

PAULINE NIGHTINGALE, and
EDWARD M. BELASCO,
503 State Building, Los Angeles 12,
Attorneys for Appellant.

TOPICAL INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	3
Statement of the case.....	3
Specification of error.....	6
Summary of argument.....	7
Argument	8
A. Vacation pay constitutes wages within the provisions of Section 64a(2) of the Bankruptcy Act.....	8
B. Principles concerning pro-rata earning of vacations estab- lished in the case of In re Public Ledger, Inc., do not apply to the case at bar.....	8
C. All the vacation wages of appellant's assignors were en- titled to priority under the provisions of Section 64a(2) of the Bankruptcy Act.....	11
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
B. H. Gladding Co., In re, 120 Fed. 709.....	8
Kinney Aluminum Company, Bankrupt, In the Matter of, No. 44,950-WM	12
Magazine Associates, Inc., In re, 43 Fed. Supp. 583.....	11
Manly v. Hood, 37 F. (2d) 212.....	14
Men's Clothing Authority, In re, 71 Fed. Supp. 469.....	9
National Marble & Granite Co., 206 Fed. 185.....	11
Public Ledger, Inc., In re, 161 F. (2d) 762.....	8, 9, 10
Wil-Low Cafeterias, Inc., In re, 111 F. (2d) 429.....	8, 10

STATUTES

Bankruptcy Act, Sec. 24(a).....	2
Bankruptcy Act, Sec. 64a (11 U. S. C., Chap. 7, Sec. 104).....	3
Bankruptcy Act, Sec. 64a(2).....	2, 5, 6, 7, 8, 12
Judicial Code, Sec. 128(c).....	2

No. 11939

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF
CALIFORNIA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of C. A. Reed Furniture Company, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF

Opinion Below

The court below did not file a written opinion. The order affirming the order of the referee in bankruptcy is set forth in the record at pages 39 to 41 inclusive.

Jurisdiction

This proceeding arose in the District Court of the United States for the Southern District of California, Central Division, when a petition in bankruptcy was filed. Following adjudication and general reference, Appellant, as statutory assignee of wage claimants who were former employees of the bankrupt, filed its Proof of Unsecured Debt in Bankruptcy (Priority) [R. 2-4], whereupon Appellee filed Notice of Hearing on Objections to Claim of G. O. Thrailkill [R. 42-43], Appellant's Los

Angeles office supervisor who signed the proof of debt above. On December 16, 1947 a hearing was held before the referee in bankruptcy, and the referee's Order Determining Extent of Priority of Employee's Claims [R. 4-5] was rendered on January 8, 1948. Appellant filed its Petition for Review of Referee's Order Determining Extent of Priority of Employees' Claims [R. 32-36] on January 29, 1948. The referee in bankruptcy on February 4, 1948 issued his Amendment to Order of January 8, 1948 [R. 30-31] and filed his Referee's Certificate on Review on February 5, 1948 [R. 37-39]. By Stipulation to Supplement Record [R. 6-30] filed on February 5, 1948 the collective bargaining agreements between the bankrupt and the unions to which Appellant's assignors belonged were made part of the record of the case. Following a hearing in the District Court, the district judge entered his Order Affirming Order of Referee [R. 39-41] on April 12, 1948, and Appellant filed its Notice of Appeal [R. 41-42] on May 3, 1948.

The jurisdiction of this Court to hear and determine this appeal is conferred by Sec. 24(a) of the Bankruptcy Act, as amended, and Sec. 128(c) of the Judicial Code.

Question Presented

If an employee's eligibility for vacation pay occurs during the three months' period prior to the commencement of the bankruptcy proceeding of his employer, is all of the unpaid vacation pay entitled to priority status as wages earned within the provisions of Sec. 64a(2) of the Bankruptcy Act?

Statute Involved

Sec. 64a of the Bankruptcy Act (U.S.C. Title 11, Ch. 7, Sec. 104) provides:

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) . . .; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) . . .”

Statement of the Case

The facts are not in dispute. Appellant's assignors, former employees of the bankrupt, were members of either the Upholsterers' Union, Local No. 15, or the Furniture Workers' Union, Local No. 3161. The collective bargaining agreements mentioned above were in full force and effect during all periods referred to herein. Although the entire agreements are set forth in the record, pages 7-30, for the Court's convenience the vacation clauses of the agreements are here set forth:

1. The vacation clause of the Upholsterers' Union collective bargaining agreement:

“VII.

“Vacation.

“The employer's established personnel covered by this Agreement who have been in the employ of the

Employer for one year, or more, and who have been in continuous good standing of the Union, shall receive a week's vacation with forty (40) hours' pay at the wage rate prevailing immediately prior to the vacation. Such vacation shall be taken at a time mutually agreeable to the employee and the Employer. Employees with five years' service shall receive two weeks' vacation with pay."

2. The vacation clause of the Furniture Workers' Union collective bargaining agreement (omitting portions concerning veterans which are not at issue):

"Article VII.

"(a) Each employee shall receive one (1) weeks vacation after one (1) year of service with the Company and two (2) weeks vacation after three (3) years of service with the Company, except that this liberalized vacation benefit shall not apply to those employees who have taken their 1946 vacations.

"(b) Vacations shall be taken during July, August, or September and vacation pay shall be computed at any time it accrues during that period.

"(c) . . . (veterans—omitted portion.)

"(d) Week's vacation as used herein is understood to be 40 hours times the straight time hourly rate at the time vacation is due.

"(e) In the event an employee has worked a full year for the Company and then terminates his employment, he shall be entitled to receive his earned vacation pay. There shall be no pro-rata vacation."

Bankruptcy of the employer ensued shortly after the employees completed their year's eligibility period to qualify for vacation for the vacation year 1946-47, and none received his vacation. The Appellee, trustee in bankruptcy, made an accurate breakdown of the payroll records of the bankrupt and correctly calculated all vacation pay earned by the employees. At the hearing before the referee in bankruptcy, Appellee contended, and this contention was sustained by the referee and the district judge, that only one-fourth of the vacation pay due was entitled to priority status under Sec. 64a(2) of the Bankruptcy Act, since one-fourth of the vacation pay represented vacation pay earned during the three months prior to bankruptcy, and that the remaining three-fourths of the vacation pay was entitled only to general claim status since it represented vacation pay earned more than three months prior to bankruptcy. Appellant's contention is that the condition precedent to the earning of vacation pay by an employee under either collective bargaining agreement is the completion of a designated period of continuous service with the employer, and since the designated period of service was completed by each employee herein during the three months prior to bankruptcy, the entire vacation pay was then and there earned and therefore was entitled to priority status under Sec. 64a(2) of the Bankruptcy Act. Following the adverse ruling on this point of law, the Notice of Appeal was filed.

Specification of Error

The District Court erred as follows:

1. The Court erred in rendering its Order of April 12, 1948 in which the Order of the Referee in Bankruptcy of January 8, 1948, as amended on February 4, 1948, was confirmed.

2. The Court erred in ruling as a matter of law that Appellant's assignors' vacation wages were not entitled to priority status under the provisions of Sec. 64a(2) of the Bankruptcy Act.

3. The Court erred in ruling as a matter of law that only one-fourth of the vacation wages of Appellant's assignors was entitled to priority status as wages under the provisions of Sec. 64a(2) of the Bankruptcy Act.

4. The Court erred in not ruling as a matter of law that vacations with pay provided in the two collective bargaining agreements herein were earned only after all conditions precedent to their earning were complied with by Appellant's assignors.

5. The Court erred in not ruling as a matter of law that all the vacation wages claimed by Appellant's assignors were earned within three months prior to the institution of this bankruptcy proceeding.

6. The Court erred in failing to rule as a matter of law that because the collective bargaining agreements herein did not contain provisions for pro-rata earning of vacations with pay, the referee in bankruptcy was in error when he calculated the earning on a pro-rata basis.

7. The Court erred in ruling as a matter of law that three-fourth's of the vacation pay of Appellant's assignors was entitled to status as a general claim only.

Summary of Argument

- A. VACATION PAY CONSTITUTES WAGES WITHIN THE PROVISIONS OF SEC. 64A(2) OF THE BANKRUPTCY ACT.
- B. PRINCIPLES CONCERNING PRO-RATA EARNING OF VACATIONS ESTABLISHED IN THE CASE OF IN RE PUBLIC LEDGER, INC. DO NOT APPLY TO THE CASE AT BAR.
- C. ALL THE VACATION WAGES OF APPELLANT'S ASSIGNORS WERE ENTITLED TO PRIORITY UNDER THE PROVISIONS OF SEC. 64A(2) OF THE BANKRUPTCY ACT.

ARGUMENT

A. Vacation Pay Constitutes Wages Within the Provisions of Sec. 64a(2) of the Bankruptcy Act.

It is now well established that vacation pay, or pay in lieu of vacation, constitutes "wages" as that term is used in Sec. 64a(2) of the Bankruptcy Act.

In re Public Ledger, Inc. (C.C.A. 3d), 161 F. (2d) 762;

In re Wil-Low Cafeterias, Inc. (C.C.A. 2d), 111 F. (2d) 429;

In re B. H. Gladding Co., 120 Fed. 709.

B. Principles Concerning Pro-Rata Earning of Vacations Established in the Case of *In Re Public Ledger, Inc.* Do Not Apply to the Case at Bar.

In his certificate on review the referee in bankruptcy states that his decision is based on *In re Public Ledger, Inc.*, *supra*. In that case there were collective bargaining agreements containing vacation clauses which specifically called for the pro-rata earning of vacations with pay. The Third Circuit pointed out that the employees under the agreements earned one day's vacation for every twenty-six days worked; as each twenty-six day work period was completed, an employee so working accrued another day's vacation. Since this earning was on a definite pro-rata basis, it was the court's ruling that each employee was entitled to a prior wage claim for the wages he earned during the three months prior to bankruptcy. A District Court in *In re Men's Clothing Authority*

(S.D.N.Y.), 71 Fed. Supp. 469 had previously held the same under similar circumstances.

Herein not only was there no pro-rata vacation provision in either contract, but the Furniture Workers' collective bargaining agreement specifically provided that *there shall be no pro rata vacation*. An employee under one of the agreements involved in the *Public Ledger* case could have quit after fifty-two days' work and been eligible for two days' vacation pay; an employee could have been discharged after two hundred and eight days' work and been eligible for eight days' vacation pay. Under the agreement in the case at bar, an employee who quit or was discharged four, seven or ten months after commencing his year's employment would receive no vacation pay whatsoever; until the year's continuous service was completed, an employee under either agreement earned no vacation whatsoever. For the court below to sustain a ruling wherein pro-rata earning of vacation pay is implied in an agreement where it is specifically excluded is clearly an error. For the court below to hold that an employee earned "something" at the end of nine months, when under the agreement he did not earn "anything" at that time is likewise error.

Vacation pay must be distinguished from ordinary wages. As the minutes, hours, days and weeks of work go by the worker is earning wages, no matter how his pay is computed. At the time his employment ceases he is entitled under the provisions of the California Labor Code to all his wages up to the time of termination. Va-

cation pay is different: the worker is only entitled to it when he has complied with the contractual provisions under which it is allowed. It is conceivable that an employer may contract that vacation pay will be earned coincidental with ordinary wages, but vacation pay ordinarily is based upon completion of some continuous period of service. As was said in the *Wil-Low Cafeterias* case (*supra*):

“A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee.”

It is only when the employee has fully complied with the conditions precedent to his vacation that he becomes entitled to it; namely, earns it. Typical examples of conditions precedent in vacation contracts are: one day's vacation for every twenty-six days worked; one week's vacation for one year's continuous service; one week's vacation for 1600 straight time hours worked in one fiscal year; one week's vacation for all employees working for at least one year and being on the company payroll as of May 1st of the vacation year; one week's vacation for employees who have been in continuous employment for one year and who have not taken sick leave or other leave in excess of seven days. Prior to complaine in a given situation an employee has earned nothing; after complaine he has earned whatever vacation was promised him.

Appellee urges that for the reasons given and because of the differences in the collective bargaining agreements involved, the ruling of the Third Circuit in the *Public Ledger* case has no application to the case at bar.

C. All the Vacation Wages of Appellant's Assignors Were Entitled to Priority Under the Provisions of Sec. 64a(2) of the Bankruptcy Act.

The courts have held consistently that priority is granted to claims for wages accruing within three months before the date of the commencement of the bankruptcy proceeding, even though the actual services rendered by the employee were performed prior to that time. A leading case on this subject is *In re National Marble & Granite Co.*, 206 Fed. 185. There a salesman worked under an agreement providing for payment of his commission not when he sold the monument but when the monument was delivered and payment made. He sold the monument in March, 1911, and bankruptcy commenced in January, 1912; payment and delivery occurred within three months of bankruptcy. Priority was claimed for the entire commission. The court sustained the claim, stating:

“It is perfectly clear that Brock was not entitled to his compensation until the monument was erected and paid for; all the testimony shows that, although he made the contract for the sale of the monument something like ten months before the bankruptcy proceeding, he was not to receive anything at all for his services in connection with the sale of the monument until the company received the money for it. I cannot escape the conclusion that the commission was not ‘earned’ until the monument was paid for.”

Similar is the case of *In re Magazine Associates, Inc.*, 43 Fed. Supp. 583, in which the claimant was a salesman who procured advertising from Schenley Distillers for publication in Scribner's Magazine. The advertising contract was approved on February 10, 1939, and provided for copy in the February, March, April and May

issues; it could be annulled at any time by the distillers. The employment contract of the salesman provided that he was not to be paid commissions until the 10th of each month following a publication. Bankruptcy commenced on May 26, 1939, more than three months after the sale of the advertising. The court held that the claimant was entitled to priority for his commissions, since the advertiser had the right to cancel and the commission was not earned until after publication or use of the space.

The identical issue was presented herein was determined in the case of *In the Matter of Kinney Aluminum Company, Bankrupt*, No. 44,950-WM, in the same District Court as the instant case. There full priority was claimed for vacation wages under a collective bargaining agreement containing a vacation clause similar to those in the case at bar. The vacation rights accrued after the completion of one year's service and 1600 straight time hours' work. The referee in bankruptcy upheld Appellant's contention that so long as the vacation rights accrued within three months prior to the institution of the bankruptcy proceeding, all of the vacation wages were entitled to priority under Sec. 64a(2) of the Bankruptcy Act. In upholding the referee, District Judge Mathes rendered a Memorandum of Decision wherein he covered the question now before this Court. That portion of Judge Mathes' opinion is herewith set forth:

"Hence these claimants are entitled to receive either one or two weeks' pay in lieu of vacation, depending upon the time each has been 'continuously in the employ of the company.'

"The only question which remains for determination then is whether their claims are entitled to priority of payment pursuant to Sec. 64a(2) of the Bank-

ruptcy Act [11 U.S.C. Sec. 104a(2)]. 'Wages,' within the meaning of Sec. 64a(2), includes vacation pay, or pay in lieu of vacation. [*In re Wil-Low Cafeterias, Inc.*, *supra*, 111 F. (2d) 429; *In re Public Ledger, Inc.*, 161 F. (2d) 762 (C.C.A. 3rd, 1947)]. Accordingly, the narrow issue to be resolved is whether the 'wages . . . have been earned within three months before the date of the commencement of the proceeding . . .' The specific inquiry is whether Congress intended to grant priority to claims for 'wages' accruing within three months prior to bankruptcy, even though part of the services were performed before that time, or to limit priority solely to wage claims based upon services rendered during the three-months' period.

"The purpose of the priority accorded wages is to benefit those not in a position to ascertain the financial status of their employer 'who are dependent upon their wages, and who, having lost their employment by bankruptcy would be in need of such protection.' [*Blessing v. Blanchard*, 223 Fed. 35 (C.C.A. 9th, 1915); *In re Lawsam Electric Co., Inc.*, 300 Fed. 736 (S.D.N.Y., 1924).] There appears no basis in reason or policy to limit the priority to claims for services actually rendered during the three months, as the trustee urges. To achieve fully the protection intended, the priority granted must extend to the wages which accrue to an employee within the period fixed by the Act.

"It is my opinion therefore that Sec. 64a(2) grants a priority to claims for wages accruing 'within three months before the date of the commencement of the proceeding,' even though all the services giving rise to the claims were performed prior to that time. Wages are 'earned,' within the

meaning of Sec. 64a(2), when the right to demand payment accrues. [*In re Magazine Associates, Inc.*, 43 Fed. Supp. 583 (S.D.N.Y., 1942); *In re B. H. Gladding Co.*, 120 Fed. 709 (R.I., 1903); cf. *In re Ko-Ed Tavern, Inc.*, 129 F. (2d) 806 (C.C.A. 3rd, 1942).]

“This conclusion is in no way inconsistent with *In re Public Ledger, Inc.*, *supra*, 161 F. (2d) 762 and *In re Men’s Clothing Code Authority*, 71 Fed. Supp. 469 (S.D.N.Y., 1937) relied upon by the trustee: In those cases, the right of the employees to vacation pay accrued from month to month under the contracts involved; and the courts held that each employee was entitled to a prior claim for the wages which accrued during the three-months’ period preceding bankruptcy.

“Since all conditions precedent to vacation with pay have been satisfied as to the claimants removed from the payroll by bankruptcy on May 5, 1947, their claims accrued on that day—‘the time of termination of service’ * * * ‘during the regularly established vacation period’—and so constitute ‘wages . . . earned within three months before the date of the commencement of the proceeding.’ It follows that these claimants are entitled to have their claims allowed and paid as priority claims pursuant to Sec. 64a(2) of the Bankruptcy Act [11 U.S.C. Sec. 104a(2)].”

Appellant submits that the Fourth Circuit in the case of *Manly v. Hood* (C.C.A. 4th), 37 F. (2d) 212 aptly sets forth the liberal intent of Congress in enacting the priority wage section of the Bankruptcy Act, when it said:

“There can be no question that it was the purpose and intent of Congress, by the provision in question,

to protect the wages of laborers due them by insolvents whose assets had been taken over by the courts under the act. The laborer is generally dependent upon his wages for livelihood and the support of his family, and he has little means of judging of the solvency of his employer. Every consideration of morality, as well as of public policy, demands, therefore, that his wages be preserved to him and be given priority over ordinary commercial claims."

Conclusion.

For the reasons set forth above Appellant respectfully urges that this Court protect the priority rights of the employees of the bankrupt and reverse the orders of the District Judge and the Referee in Bankruptcy.

Respectfully submitted,

PAULINE NIGHTINGALE, and

EDWARD M. BELASCO,

Attorneys for Appellant.

No. 11939

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALI-
FORNIA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate
of C. A. Reed Furniture Company, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

McLAUGHLIN, MCGINLEY & HANSON,
FRANK WELLER and
JAMES A. McLAUGHLIN,

1224 Bank of America Building, Los Angeles 14,
Attorneys for Appellee.

FILED

AUG 11 1948

PAUL P. O'BRIEN,

TOPICAL INDEX

	PAGE
Statement of case.....	1
Statement of questions involved.....	3
Argument	5
Point I. The rule of the Public Ledger case, to the effect that the portion of the vacation compensation entitled to priority is the one-fourth earned during the three months preceding bankruptcy, is an equitable one which assures equal treatment to all employees regardless of whether their year's employment had ended within or prior to such three months' period	5
Point II. If the appellant's argument is accepted, then all of the employees under the upholsterers' contract should have been denied any priority for any part of their vacation pay	8
Point III. The employees under the furniture workers' con- tract are not benefited by the provision in their contract restricting their vacation time to the months of July, August or September	10
Conclusion	11

TABLE OF AUTHORITIES CITED

CASES	PAGE
B. H. Gladding Co., In re, 120 Fed. 709.....	6
Burton Bros. Mfg. Co., In re, 134 Fed. 157.....	6
Caledonia Coal Co., In re, 254 Fed. 742.....	6
Dunn, In re, 181 Fed. 701.....	6
Flick, In re, 105 Fed. 503.....	6
Huntenburg, In re, 153 Fed. 768.....	6
Ko-Ed Tavern, In re, 129 F. (2d) 806.....	6
McGowin Lumber Co., In re, 223 Fed. 553.....	6
Public Ledger, In re, 161 F. (2d) 762.....	3, 4, 5, 7, 8, 9
Rouse, Hazard & Co., In re, 91 Fed. 96.....	6
Slomka, In re, 122 Fed. 630.....	6
Stanley Works v. Gouland Typewriter Mfg. Co., 278 Fed. 995	6
Unit Lock Co., In re, 49 F. (2d) 313.....	6
Wil-Low Cafeteria, In re, 111 F. (2d) 429.....	5

STATUTES

Bankruptcy Act, Sec. 64a (11 U. S. C. A., Chap. 7, Sec. 104)....	5
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No. 11939

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA,

Appellant,

vs.

PAUL W SAMPSELL, Trustee in Bankruptcy of the Estate
of C. A. Reed Furniture Company, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Statement of Case.

Appellant, acting in behalf of a large number of employees of the above named bankrupt, filed a claim for their unpaid wages. The Referee allowed the claim as a prior claim to the extent of \$5,542.61, and as a general claim in the sum of \$2,880.58. [R. 5.] Part of the first sum represented compensation for earned but unused vacation time, and the latter figure represented three-fourths of the unused vacation time which the Referee found had been earned prior to the three months' period preceding the bankruptcy. [R. 4.]

The order refers to a schedule attached to it, which set forth the specific allowances to each of the employees and classified these in their amounts as to priority and to the extent that they were mere general claims without

priority. [R. 5.] To abbreviate the record, this schedule, referred to in the order as "Exhibit A" was eliminated from the record, as the appeal was believed not to involve any question as to the specific allowances to each employee, but only the question whether all earned vacation pay should be allowed as a prior claim.

The two union contracts involved now appear to be different, and this may result in a different ruling as to the status of the employees working under one of these contracts as distinguished from those working under the other. If this Court agrees with appellee, the ruling of the District Court will be found to be correct as to both of these contracts, however.

These union contracts came into the focus rather late. They were not put into evidence at the time of the hearing before the Referee, and there was no attempt to show which employees came under either of these two contracts. It was after the Referee made his order that the parties stipulated that these contracts could be made a part of the record in order that appellant might present the question of their effect in its Petition for Review to the District Court. [R. 6.]

To avoid any confusion as to the amendment which the Referee made to his original order on February 4, 1948, it should be noted that this amendment in no way touches the issues here involved. The original order had denied priority to a claim for \$242.50 in union dues withheld by the bankrupt from pay checks of the employees. [R. 5.] The amendment properly allowed this item as a prior claim. [R. 30-31.]

Statement of Questions Involved.

1. Do either of the union contracts contain any provision which makes inapplicable the rule of *In re Public Ledger*, 161 F. (2d) 762, to the effect that the portion of the vacation entitled to be classified as priority compensation is the fractional part earned within the three months preceding the date of bankruptcy.

2. The union contract covering those employees classified as upholsterers provides that employees "who have been in the employ of the employer for one year, or more, * * * shall receive a week's vacation with forty hours' pay at the wage rate prevailing immediately prior to the vacation." [R. 11] It also provides that "Such vacation shall be taken at a time mutually agreeable to the employee and the employer."

If the rule of proration established by the *Public Ledger* case (*supra*), does not apply, then would not each employee have fully earned his vacation under this contract at the end of his twelve months' period of service? If such twelve months' service had ended more than three months prior to the date of bankruptcy, should not the entire amount of such employee's claim be classified as a general claim as distinguished from a claim entitled to priority?

3. The union contract covering those employees classified as furniture workers contained the following pertinent provisions under Article VII:

"(a) Each employee shall receive one (1) weeks vacation after one (1) year of service with the Com-

pany and two (2) weeks vacation after three (3) years of service with the Company, except that this liberalized vacation benefit shall not apply to those employees who have taken their 1946 vacations.

(b) Vacations shall be taken during July, August, or September and vacation pay shall be computed at any time it accrues during that period.” [R. 20-21.]

Subparagraph (e) also provided that “there shall be no pro rata vacation.” [R. 22.]

If the *Public Ledger* rule does not apply, then did the right to the vacation accrue at the end of the year’s service of each employee? If it did not accrue then, could it be said to have accrued automatically by virtue of the bankrupt’s having been adjudicated as such, having in mind the provision to the effect that vacations should be taken during July, August or September?

ARGUMENT.

POINT I.

The Rule of the Public Ledger Case, to the Effect That the Portion of the Vacation Compensation Entitled to Priority Is the One-Fourth Earned During the Three Months Preceding Bankruptcy, Is in Equitable One Which Assures Equal Treatment to All Employees Regardless of Whether Their Year's Employment Had Ended Within or Prior to Such Three Months' Period.

The cases of *In re Public Ledger*, 161 F. (2d) 762, and *In re Wil-Low Cafeteria*, 111 F. (2d) 429, both approve the equitable doctrine of pro rating the vacation compensation entitled to priority in accordance with the amount of such vacation compensation earned within the three months preceding the date of bankruptcy. A contrary rule would mean that each employee's vacation compensation was fully earned as soon as he had the right to demand his vacation and, under a contract requiring a year's employment as a condition precedent to such vacation, the entire vacation pay would accrue at the end of such year. As to those employees whose years of employment had expired more than three months prior to the bankruptcy, they would be entitled to no priority because their vacation compensation was fully earned prior to the commencement of such three months' period. Section 64a of the Bankruptcy Act (Title 11, Ch. 7, Sec. 104, U. S. C. A.) provides a priority only as to wages "earned within three months before the date of the commencement of the proceeding."

There is no more justification for attempting to give priority to vacation pay accruing prior to such three months' period than there is to giving priority to straight wages earned prior to such three months' period.

The authorities are uniform in holding that the compensation claimed must have been earned and also must have become due within the three months' period. If either of these essentials is lacking, then the claim is not entitled to priority.

See:

In re Ko-Ed Tavern (Third Circuit), 129 F. (2d) 806, at 810;

In re Slomka (C. C. A., N. Y.), 122 Fed. 630;

In re Unit Lock Co. (D. C. Okla.), 49 F. (2d) 313, at 315 and 316;

In re Rouse, Hazard & Co. (D. C., Ill.), 91 Fed. 96;

In re Flick (D. C., Ohio), 105 Fed. 503;

In re B. H. Gladding Co. (D. C., R. I.), 120 Fed. 709;

In re Burton Bros. Mfg. Co. (D. C., Iowa), 134 Fed. 157;

In re Huntensburg (D. C., N. Y.), 153 Fed. 768;

In re McGowin Lumber Co. (D. C., Ala.), 223 Fed. 553;

In re Caledonia Coal Co. (D. C., Mich.), 254 Fed. 742;

Stanley Works v. Gourland Typewriter Mfg. Co. (D. C., N. Y.), 278 Fed. 995;

In re Dunn (D. C., N. Y.), 181 Fed. 701.

It is clear from the above authorities that the rule contended for by appellant would be a dangerous and unsatisfactory rule from the standpoint of the employees. In the first place, in order to preclude the possibility of the employee losing his priority to a claim for compensation during a vacation period he would of necessity have to take his vacation within three months after his year's employment period had expired, otherwise none of his vacation would have become due within the period of three months prior to bankruptcy.

Such a rule would result in hardship and inconvenience to the employees, and it would also place one employee in a position of priority whereas another employee, by the mere accident of having his year's period of employment terminate at a different time, would lose all of his priority.

There is still a more formidable impediment to be met with. Let us assume an instance where an employee's year's period of employment had terminated within three months prior to the bankruptcy proceedings. In such instance it is clear that he could have demanded his vacation within that period and the compensation for the vacation period would therefore become due within the three month's period; however, this vacation was not entirely earned by the work that he did on the last day of his year's employment. It was earned because he worked a full twelve months, and each day's work during that twelve months contributed to and was necessary to the earning of that vacation.

This brings us again to the logic in the *Public Ledger* case wherein the Court allowed priority in the proportionate amount of the vacation earned during the three months preceding the bankruptcy. This is the only way that employees can be placed in a position to assert any

priority on account of vacation pay. If they reject the principle of the *Public Ledger* case, they relegate themselves to the hopeless position of being unable to establish that their vacation pay became due and was wholly earned within the three months preceding the bankruptcy.

There is another infirmity in this position and that results from the fact that the contracts entitle the employees to select their time of vacation. If bankruptcy intervenes before they enter upon such vacation they have not reached the place where any vacation pay has become due them, and they are faced with the obstacle that the vacation pay did not become due within three months prior to the bankruptcy, but that it was to come due on the date subsequent to bankruptcy. Here again the statute expressly requires that wages be *due* to the employee "within three months before the date of the commencement of the proceeding."

POINT II.

If the Appellant's Argument Is Accepted, Then All of the Employees Under the Upholsterers' Contract Should Have Been Denied Any Priority for Any Part of Their Vacation Pay.

We have pointed out that Article VII of this contract entitles the employee to a vacation at the end of each year's employment. It also provides that the vacation is to be taken at a time mutually agreeable to the employer and the employee. This would mean that the employee could take his vacation at any time after the end of his year's employment provided that the time was agreeable to the employer.

We have already noted that because appellant has attempted to inject the provisions of the union contracts

into this case in order to defeat the application of the *Public Ledger* doctrine, and because such attempt occurred after the hearing and ruling of the Referee, the record is deficient in that it does not show the respective dates of the expiration of the year's employment for each employee involved. Neither does it show which contract governs which employee.

Before appellant can show the existence of any harmful error, and we do not concede that there was any error, it would be essential for appellant to show that there were employees whose year's period of employment had ended within three months prior to July 11, 1947, the date of the bankruptcy. Even if the evidence did show that there were such employees, they would still be met with the obstacle that not having taken or started to take their vacations within such three months' period, the vacation pay had not become due prior to bankruptcy.

Such employer would also be confronted with the further obstacle that regardless of whether or not they had commenced or completed their vacations within the three months' period, they could not show that they had *earned* that entire vacation by working during the three months preceding the bankruptcy. In fact, it is clear that the situation is just the contrary. They earned their vacation by working an entire year, and each day's work during such year contributed to the earning of that vacation and was necessary to the earning of such vacation.

POINT III.

The Employees Under the Furniture Workers' Contract Are Not Benefited by the Provision in Their Contract Restricting Their Vacation Time to the Months of July, August or September.

It might be argued that as to employees under this contract, their vacation compensation did not become due until one of the above mentioned months, but it is clear that regardless of when such compensation became due it was earned by each employee working an entire year. This being true, these employees are subject to the deficiency that their vacation compensation was not entirely earned within the three months' period preceding bankruptcy. In addition to this, the compensation would not have accrued to any of these employees unless they had entered upon or taken their vacations between July 1 and July 11 (the date of the bankruptcy). The record does not show whether any of the employees had taken or commenced their vacations within that period, but if they had they could not qualify for any priority because such compensation was not *earned* within the three months' period preceding bankruptcy.

The provision in the contract, that "there shall be no pro rata vacation," does not aid them. This clearly means that they must have completed a full year of employment before being entitled to any vacation. It has nothing to do with how much of the vacation pay should be allowed as a prior claim. It does not even purport to deal with the bankruptcy statute as to prior claims.

Conclusion.

There is no question involved as to the allowability of a claim for compensation during vacation. The only question is whether such claim is entitled to be allowed as a prior claim and if so, the rule which should be applied in determining the amount of such compensation which should be given priority.

The order made is not only predicated upon equitable considerations in that it allows one-fourth of the compensation as a prior claim, but it is predicated upon the only theory on which any of such vacation compensation could be given priority.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

McLAUGHLIN, MCGINLEY & HANSON,
FRANK WELLER and
JAMES A. McLAUGHLIN,

Attorneys for Appellee.

No. 11940

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a
corporation, JACK LANE, JR., JANE LANE and
LUCILLE LANE,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

JUN 29 1948

PAUL P. O'BRIEN,

No. 11940

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a
corporation, JACK LANE, JR., JANE LANE and
LUCILLE LANE,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Affidavit of Harold F. Birnbaum in Support of Motion for Preliminary Injunction.....	21
Affidavit of Harold F. Birnbaum in Support of Motion for Preliminary Injunction, Counter.....	31
Affidavit of William Felstiner in Support of Motion for Preliminary Injunction.....	33
Affidavit of Jack Lane, Jr., in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction.....	23
Affidavit of Raphael Bryant Malsin in Support of Motion for Preliminary Injunction.....	10
Exhibit A. Catalogue of Lane Bryant.....	20
Affidavit of Max L. Raskoff in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction.....	27
Exhibit A. Letter, Dated February 26, 1946, to Spiro, Felstiner & Prager From Max L. Raskoff	30
 Appeal:	
Bond for Costs on.....	52
Notice of	51
Order Extending Time to Docket.....	55
Statement of Points Upon Which Appellant Intends to Rely on (Circuit Court).....	60
Stipulation and Order for Transmission of Original Papers	56
Bond for Costs on Appeal.....	52

	Page
Certificate of Clerk.....	58
Complaint for Injunction.....	2
Findings of Fact and Conclusions of Law.....	45
Judgment of Dismissal.....	50
Memorandum in Support of Finding and Conclusion Objected to by Plaintiff.....	38
Minute Order Filed and Entered January 12, 1948.....	34
Motion for Preliminary Injunction, Notice of.....	9
Motion to Dismiss, Notice of.....	22
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	51
Objection to Proposed Findings of Fact and Con- clusions of Law, Plaintiff's.....	35
Order Denying Preliminary Injunction.....	49
Order Extending Time to File Record and Docket Ap- peal	55
Order for Transmission of Original Papers.....	57
Order re Exhibits (Circuit Court).....	62
Statement of Points Upon Which Appellant Intends to Rely on (Circuit Court).....	60
Stipulation and Order for Transmission of Original Papers	56
Stipulation and Request That Certain Exhibits Be Considered by the Court in Their Original Form (Circuit Court)	61
Stipulation Extending Time to File Record and Docket Appeal	54
Substitution of Attorneys, Notice of.....	55

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 7664-PH

LANE BRYANT, INC., a corporation,

Plaintiff,

vs.

MATERNITY LANE LTD. OF CALIFORNIA, a corporation;
JACK LANE, JR.; JANE LANE; LUCILLE LANE;
JOHN DOE ONE; and JOHN DOE TWO,

Defendants.

COMPLAINT FOR INJUNCTION

Plaintiff above named complains of the above named defendants as follows:

I.

At and during all of the times hereinafter mentioned plaintiff has been and now is a corporation organized and existing under the laws of the State of Delaware.

II.

Ever since March, 1946, defendant, Maternity Lane Ltd. of California has been and still is a corporation organized and existing under the laws of the State of California, doing business in the Southern District of California, and defendants Jack Lane, Jr., Jane Lane and Lucille Lane have been and still are citizens of California and officers of Maternity Lane Ltd. of California, [2] to wit: president, vice president and treasurer respectively.

III.

John Doe One and John Doe Two are sued herein as fictitious defendants for the reason that plaintiff is not acquainted with their true names and when the same are discovered plaintiff will ask leave to substitute the same for said fictitious names.

IV.

Jurisdiction herein is founded upon the diversity of citizenship between the plaintiff and the defendants and the matter in controversy herein, exclusive of interest and costs, exceeds the value of \$3,000.00.

V.

Plaintiff was organized in 1920 to acquire, and it did acquire and thereafter conduct, the business, good will and trade-marks of a New York corporation of the same name which had been organized in 1916 to acquire, and which did acquire and thereafter conduct, the business, good will and trade-marks of an enterprise established by Lane Bryant, an individual, in 1900.

VI.

From its inception said business specialized in maternity apparel and apparel for stout women and for many years has done a large business in such apparel under the name "Lane Bryant", through its retail stores and departments, in addition to an extensive mail order business in the United States and Canada under said name. Plaintiff operates seven stores, directly or through wholly owned subsidiaries, under the name "Lane Bryant" in New York, New York; Brooklyn, New York; Chicago, Illinois; Philadelphia, Pennsylvania; St. Louis, Missouri; Detroit, Michigan; and Baltimore, Maryland. Wholly owned subsidiaries of plaintiff operate stores in which "Lane Bryant

Departments" are maintained in Cleveland, Ohio; St. Paul, Minnesota; Oshkosh, Wisconsin; Green Bay; Wisconsin; Davenport, Iowa; Des Moines, Iowa; South Bend, Indiana; Springfield, Illinois; [3] Kankakee, Illinois; Rockford, Illinois; Waukegan, Illinois; and Decatur, Illinois. Plaintiff's mail order division is located at Indianapolis, Indiana.

VII.

Commencing in 1911, "Lane Bryant" was used in said business as a common law trade-mark. Application for registration thereof was filed in the United States Patent Office on October 20, 1927, and issued as trade-mark No. 238911 on February 14, 1928.

VIII.

Since 1916 plaintiff and its predecessor Lane Bryant, Inc., a New York corporation, have expended approximately \$33,000,000.00 in advertising its retail and mail order business under said corporate name and said trade-mark, in newspapers and magazines throughout the United States. In addition, the plaintiff and said predecessor have expended approximately \$10,000,000.00 over the same period of years in connection with mail order catalogues which have been widely distributed throughout the United States. More than 50,000 of said mail order catalogues for maternity apparel were mailed in the year 1938 through the spring of 1947 to customers of plaintiff living in California.

IX.

In its advertising of maternity apparel, plaintiff has stressed the word "Maternity" in association with the plaintiff's corporate name and trade-mark, by the composition and typography of the material. As a part of

such advertising and in furtherance of its purpose, plaintiff's predecessor adopted the phrase "Mothers-to-be" or the phrase "Mother-to-be" in 1918, and said phrase has been continuously used by it and by plaintiff since that time.

X.

Plaintiff has become permanently identified in the public mind as a specialist in maternity apparel; and the name "Lane Bryant", the word "Maternity" and the phrase "Mother-to-be" when [4] used in conjunction with "Lane Bryant" or other similar name or word in advertising maternity apparel have acquired a secondary meaning throughout the United States whereby the public associates such name, word and phrase, when used as herein described, as referring to and meaning the plaintiff.

XI.

Plaintiff's business started with one store in New York City and said business has been expanded by plaintiff's entry into the mail order field and by the establishment of additional retail stores and departments under the name "Lane Bryant" in other cities. Plaintiff has many customers residing in Los Angeles who purchase from it by mail order and at said retail stores and departments. Plaintiff may hereafter establish retail stores and departments under the name "Lane Bryant" in California, and particularly in Los Angeles.

XII.

Plaintiff has acquired a high reputation in its field and a good will which is worth greatly in excess of \$1,000,000.00.

XIII.

In March, 1946, defendant Maternity Lane Ltd. of California established and has thereafter operated a retail store for the sale of maternity apparel located on the ground floor at 3837 Wilshire Boulevard, Los Angeles, California. Said store maintains a large neon sign and also a sign on its window containing the words "Maternity Lane" written in a script closely resembling plaintiff's trade-mark and corporate name. Shortly thereafter said defendant commenced and has since continued to solicit mail order business for such apparel throughout the United States, by means of an advertising program in nationally circulated magazines as well as in Los Angeles newspapers. Said acts of said defendant have been done by and through the participation of the individual defendants who are the officers and agents of said corporate defendant. [5]

XIV.

By the adoption and exploitation of the corporate name "Maternity Lane Ltd. of California", which the defendants frequently shorten to "Maternity Lane Ltd.", defendants in the conduct of their business are endeavoring to pass themselves off as being connected with plaintiff in a manner and with the intent to deceive the public, and to cause the public to believe that maternity apparel sold by plaintiff can be purchased at the retail store of said defendant or by mail order from it. As an illustration of defendants' conduct, they have copied and repeatedly used the phrase "Mother-to-be" and in at least one instance, which has come to plaintiff's attention, an advertisement of the corporate defendant copied said phrase in the identical script which plaintiff had developed and adopted therefor.

XV.

Plaintiff has protested to the corporate defendant against the use by it of the name "Maternity Lane Ltd. of California" and the simulation of plaintiff's corporate name and trade-mark. Despite such protests defendants have not only refused to discontinue the use of the name "Maternity Lane Ltd. of California" but have thereafter intensified their simulation of plaintiff and plaintiff's corporate name and trade-mark.

XVI.

The acts of defendants which are complained of herein were done in violation of plaintiff's exclusive right to its trade-mark "Lane Bryant" used in connection with plaintiff's sale of maternity apparel, and with a fraudulent and unlawful intent and design to appropriate the plaintiff's good will by simulating its corporate name and trade-mark and by imitating plaintiff's distinctive advertising and slogans, all for the purpose of thereby unlawfully diverting plaintiff's customers and business to the corporate defendant. [6]

XVII.

Unless defendants are immediately restrained in accordance with the prayer of this complaint, plaintiff will be irreparably damaged and the public will be deceived and defrauded as hereinabove alleged.

XVIII.

Plaintiff has no speedy or adequate remedy at law and the extent of the injury which it will suffer in its business as hereinabove alleged cannot be compensated adequately or at all in damages.

Wherefore plaintiff prays:

1. That the court issue (a) a preliminary injunction pending the trial of this action and (b) upon the trial of this action an order making such preliminary injunction permanent, restraining the defendants and each of them and all of their agents, officers, servants, employees and stockholders from including or using, in any name under which they or any of them do or might do business, and in all advertising or publishing which any of them do or cause to be done, or may hereafter do or cause to be done in connection with their said business or any part thereof, the word "Lane" in connection with the word "Maternity" or any other word pertaining to the maternity apparel business or any simulation thereof or the phrase "Mother-to-be" or any colorable imitation thereof, and from using the name "Maternity Lane" or "Maternity Lane Ltd. of California" or any colorable imitation thereof in connection with their said business.

2. That plaintiff have its costs incurred herein.

3. That plaintiff may have such other and further relief as may be just and proper in the premises.

LOEB AND LOEB

By H. F. Birnbaum

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith,
Clerk. [7]

[Title of District Court and Cause]

NOTICE OF MOTION FOR PRELIMINARY
INJUNCTION

To the Defendants Above Named and to Their Attorneys:

You and Each of You Will Please Take Notice that upon the Affidavit of Raphael Bryant Malsin verified the 22nd day of August, 1947, and the Affidavit of Harold F. Birnbaum verified the 30th day of September, 1947, a motion will be made in this court on the 20th day of October, 1947, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction restraining you and each of you, during the pendency of this action and until further order of this court, from including or using in any name under which you or any of you do or might do business, and in all advertising or publicizing which you or any of you do or cause to be done, or may hereafter do or cause to be done in connection with your said business or any part thereof, the word "Lane" in connection with the word [8] "Maternity" or any other word pertaining to the maternity apparel business or any simulation thereof or the phrase "Mother-to-be" or any colorable imitation thereof, and from using the name "Maternity Lane" or "Maternity Lane Ltd. of California" or any colorable imitation thereof in connection with your said business.

LOEB AND LOEB

By H. F. Birnbaum

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith,
Clerk. [9]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

State of New York

County of New York—ss.

Raphael Bryant Malsin, being duly sworn deposes and says:

I am president of Lane Bryant, Inc., the plaintiff herein and am the son of Mrs. Lane Bryant Malsin who founded plaintiff's business.

Plaintiff was organized as a Delaware corporation in 1920 to acquire the business, good will and trade-marks of Lane Bryant, Inc., a New York corporation which had been organized in 1916 to take over the business, good will and trade-marks of the business established by my mother in 1900.

Said business has specialized, since it was organized, in maternity apparel and apparel for stout women. The plaintiff now operates, directly or through wholly owned subsidiaries, seven stores under the name "Lane Bryant" in New York, New York; Brooklyn, New York; Chicago, Illinois; Philadelphia, Pennsylvania; St. Louis, Missouri; Detroit, Michigan; and Baltimore, Maryland; and has "Lane Bryant Departments" in stores operated under different names by wholly owned subsidiaries of plaintiff in Cleveland, Ohio; St. Paul, Minnesota; Oshkosh, Wisconsin; Green Bay, Wisconsin; Davenport, Iowa; Des Moines, Iowa; South Bend, Indiana; Springfield, Illinois; Kankakee, Illinois; Rockford, Illinois; Waukegan, Illinois; and Decatur, Illinois. A total of 19 stores and departments in the United States, and a mail order division

located in Indianapolis, Indiana, sell "Lane Bryant" maternity apparel under that name.

Plaintiff's consolidated net sales (of which approximately 5% were sales of maternity apparel) during the years 1937 to 1946, inclusive, were:

1937	\$14,614,004.16
1938	14,111,440.95
1939	13,355,727.67
1940	14,088,839.48
1941	15,373,983.24
1942	20,554,051.48
1943	26,786,969.15
1944	32,057,177.79
1945	36,699,126.89
1946	41,056,992.41

Of such sales approximately 25% were mail order sales done by the mail order division hereinafter described.

The mail order division of the plaintiff was started in 1912. Thereafter separate catalogues, one for the maternity line and one for the stout woman's line, were published in the spring and also in the fall of each year. In the years 1939 through the spring of 1947, inclusive, more than 2,000,000 catalogues for the maternity line have been distributed throughout the United States and Canada. More than 50,000 of said catalogues were mailed in said years to customers of plaintiff living in California, and more than 6,200 to customers of plaintiff in Los Angeles. Such catalogues average 36 pages and a specimen of the most recent such catalogue is attached hereto marked Exhibit "A", and made a part hereof.

In addition to the distribution of mail order catalogues plaintiff has advertised extensively in newspapers, in

nationally circulated magazines and over the radio. Since 1916 plaintiff and its predecessor Lane Bryant, Inc., a New York corporation, has expended approximately \$33,000,000 in advertising its retail and mail order business in newspapers and magazines throughout the United States under its corporate name and the trade-mark hereinafter referred to. In addition the plaintiff has expended over the same period of years approximately \$10,000,000 in connection with its catalogues which have been widely distributed throughout the United States, including particularly the State of California and the City of Los Angeles.

In 1911 "Lane Bryant" was adopted and thereafter used in said business as a common law trade-mark. Application for registration thereof was filed in the United States Patent Office on October 20, 1927, and issued as trade-mark No. 238911 on February 14, 1928. A copy thereof is annexed hereto, marked Exhibit "B" and made a part hereof. In all advertising throughout the many years, the plaintiff and its predecessors have always stressed the name and trade-mark, "Lane Bryant"; and have associated the word "Maternity" in connection and conjunction with said name "Lane Bryant" in advertising maternity apparel.

Annexed hereto marked Exhibit "C" and made a part hereof are specimens of typical advertisements of the maternity line which have been published by plaintiff in nationally circulated magazines in recent years; said exhibits list the magazines and the issues in which such advertisements appeared.

One of the purposes of plaintiff's advertising has been to establish in the minds of the public the fact that plain-

tiff is a specialist in maternity apparel. In furtherance of its purpose of establishing plaintiff's business in maternity apparel in the mind of the public, the slogan "Mothers-to-be" was adopted in 1918 and thereafter used continuously in said advertising material. Annexed hereto and marked Exhibit "D", and made a part hereof is a copy of a catalogue cover page, issued in 1918 by the plaintiff's predecessor, containing the phrase "Mothers-to-be". Exhibit "E" annexed hereto and made a part hereof is a copy of an advertisement of the plaintiff used in New York, with the phrase "Mother-to-be". It is a specimen of a typical 1947 ad, published by the plaintiff throughout the United States in various cities thereof, showing the phrase and the distinctive script which the plaintiff has adopted therefor. The phrase is also occasionally used in the text, as illustrated by Exhibit "F" annexed hereto and made a part hereof, which appeared in the June, 1947, issue of Charm Magazine.

Although plaintiff does not advertise in local Los Angeles newspapers, its advertising program is carried to customers in California and in Los Angeles, not only by the use of nationally circulated magazines as set forth in Exhibit "C", which magazines have a large circulation in California and Los Angeles, but also by advertisements in newspapers which have substantial circulation in California and Los Angeles; for example, the Chicago Tribune, New York Herald Tribune and various daily papers published in the cities in which plaintiff and its subsidiaries have stores. Plaintiff advertises daily in the New York Times which has a circulation in California of 8,126 for its Sunday edition and 1,567 for its daily editions, of which approximately 50% is in the Los Angeles trading area, according to information supplied by the Los Angeles office of the New York Times.

Furthermore, the widespread publicity which plaintiff has received is illustrated by an article appearing in the February 10, 1947 issue of Time Magazine of which a copy is annexed, marked Exhibit "G" and made a part hereof. In addition affiant knows that the name "Lane Bryant" as synonymous with maternity apparel has repeatedly been the subject of comment in radio programs and nationally syndicated columns as indicated in the statement in Time Magazine that a visit to Lane Bryant's store "almost automatically lands a woman in Winchell's column."

In addition to its mail order business, which covers the entire United States, plaintiff has engaged in a program of geographical expansion of its retail outlets maintained under the name "Lane Bryant", or in its subsidiary names with "Lane Bryant Departments", and may hereafter establish such retail outlets under such name in California, and particularly in Los Angeles. This plaintiff has for more than two years maintained and still maintains a buying office located at 824 South Los Angeles Street, Los Angeles, California.

Affiant believes that it is a matter of common knowledge that there has been a tremendous movement of population to the Los Angeles area and that this necessarily includes a large number of persons who have purchased maternity apparel at plaintiff's retail outlets or through its mail order service or who know of plaintiff's business in maternity apparel, and that many of such persons are potential customers of plaintiff.

Attached hereto marked Exhibit "H" is a photograph of the exterior of defendant's store in Los Angeles, California, and affiant calls attention to the manner in which the words "Maternity Lane" are written in a script closely

resembling that used in plaintiff's corporate name and trade-mark. Not content with the simulation of plaintiff's corporate name and trade-mark, in connection with the sale of maternity apparel, in which the plaintiff has been engaged for so many years, the defendant has gone further and in its advertising has used the slogan and phrase "Mother-to-be" which the plaintiff and its predecessor have been using since 1918.

Attached hereto marked Exhibits "I" and "J" are specimens of newspaper advertising published by defendant on page 6 of the Second Section of the Los Angeles Times of May 8, 1947, and a specimen of a magazine advertisement published by defendant on page 45 of the June, 1947, issue of the magazine Charm, in which issue plaintiff also had an advertisement appearing on page 50 thereof (Exhibit "F"). Defendant may have used other media presently unknown to affiant. Plaintiff published advertisements of its maternity line in said magazine Charm in April, 1945, September, 1945, March and April, 1946, September and October, 1946, and March, April and June, 1947. In defendant's advertisement published in the magazine Charm, and in the newspapers, defendant has used its name, which simulates part of plaintiff's corporate name and trade-mark and has repeated its use of plaintiff's featured phrase "Mother-to-be" and has continued its attempt to take unto itself and benefit by plaintiff's good will by using, at least in Exhibit "J", a script and format for said phrase which is almost identical with that used by plaintiff in its name and as shown in Exhibit "E" except that defendant has capitalized the letters "t" and "b". Affiant believes that the change in typography of the phrase "Mother-to-be" as illustrated by the difference between Exhibit "I" and Exhibit "J" shows the man-

ner in which defendant is increasing its effort to hold itself out as being connected with plaintiff, and to imitate plaintiff's name and slogan. The attention of the Court is likewise called to the fact that the defendant is seeking to engage in a mail order business as evidenced by the coupon attached to the ad appearing in Exhibit "J", in competition with plaintiff and under a name which simulates that of the plaintiff, in which the defendant has taken part of the plaintiff's corporate name and trademark and has combined it with the word "Maternity" to indicate that defendant is dealing in apparel for which plaintiff is known to be a specialist.

Affiant further believes that plaintiff's good name and national standing will continue to cause many residents of California and particularly of the Los Angeles area to desire to purchase merchandise from plaintiff and that there is a great danger that defendant's conduct if persisted in will confuse such persons and lead them to believing that defendant's store in Los Angeles is a retail outlet of plaintiff. In addition defendant's solicitation of mail order business by advertising in the same media as the plaintiff, under a name and format which is a copy of and simulation of plaintiff's corporate name and trademark, will cause confusion among plaintiff's present and potential mail order customers.

Plaintiff's good will has been built up at large expense over a period of more than twenty-five years, and while affiant is unable to place a precise valuation upon it affiant believes that such good will is worth greatly in excess of \$1,000,000.

Plaintiff has caused its counsel to protest to defendant against the continued use of the corporate name Ma-

ternity Lane, Ltd. of California. Attached hereto marked Exhibits "K", "L" and "M" are copies of telegram dated February 15, 1946, letter dated February 15, 1946, and letter dated January 7, 1947, containing such protests. Although no written reply has been received to any of such communications affiant has been informed that defendant had made oral statements to plaintiff's counsel rejecting such protests and indicating that defendant intends to continue its present name and manner of doing business, which affiant believes is unfair competition.

The acts of the defendant in

(a) Using a corporate name, which resembles and takes unto itself part of the corporate name and trade-mark of the plaintiff, in the maternity apparel business in which the plaintiff has been engaged for many years;

(b) Attempting in the course of such business to divert unto itself the good will of the plaintiff by simulating its corporate name and by copying and paraphrasing the advertising slogans and phrases of the plaintiff with respect to "Mother-to-be" in connection with the use of plaintiff's corporate name and trade-mark;

(c) Seeking to divert plaintiff's business unto itself by advertising for mail order business in the same media used by the plaintiff, i. e., in nationally circulated magazines, under an imitative name and similar slogans;

(d) Attempting to solicit retail and mail order business under a name similar to plaintiff's in a field in which plaintiff has been preeminent for more than twenty-five years

is to the detriment of this plaintiff and is likely to cause and may cause confusion in the mind of the public generally between the identity of this plaintiff and this defendant and will cause plaintiff irreparable damage unless defendant is enjoined from the practices herein complained of, and more particularly is enjoined from using the name "Lane" alone or in connection with the word "Maternity" or any other similar word in connection with the sale of maternity apparel.

Wherefore, deponent prays that the Court issue a preliminary injunction pending the trial of this action restraining the defendants and each of them, all of their agents, officers, servants, employees and stockholders from including and using, in any name under which they do or might do business and all advertising and publishing which any of them do or cause to be done or may hereafter do or cause to be done in connection with their said business or any part thereof, the word "Lane" in connection with the word "Maternity" or any other word pertaining to the maternity business or any simulation thereof or the phrase or slogan "Mother-to-be" or any colorable imitation thereof and from using the name "Maternity Lane" or "Maternity Lane Ltd., of California" or any colorable imitation thereof in connection with the business of maternity garments.

That the plaintiff have such other and further relief as may be just and proper in the premises.

RAPHAEL BRYANT MALSIN

Subscribed and sworn to before me this 22nd day of August, 1947.

(Seal)

LILLIAN YAMPOLE

Notary Public in the State of New York, Residing in New York County. N. Y. Co. Clk's No. 22, Reg. No. 52-Y-8. Kings Co. Clk's No. 10, Reg. No. 36-Y-8. Commission Expires March 30, 1948.

State of New York

County of New York—ss.:

No. 50630

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Lillian Yampole, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of *his* appointment and qualifications, and *his* autograph signature, have been filed in my office; that as such Notary Public *he* was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other

written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with *his* autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 22 day of Aug., 1947.

(Seal)

ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County

Fee Paid 25¢

(Exhibit A—Catalogue)

* * * * *

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith,
Clerk.

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

State of California

County of Los Angeles—ss.

Harold F. Birnbaum, being first duly sworn deposes and says:

I am a member of the firm of Loeb and Loeb and am counsel for the plaintiff in the above entitled action.

Since the Affidavit of Raphael Bryant Malsin, verified the 22nd day of August, 1947, was prepared, affiant has been informed that the advertisement of the defendant Maternity Lane Ltd. of California, a copy of which is annexed to Mr. Malsin's affidavit as Exhibit "J", was republished in the July 1947 issue of Charm Magazine at page 22.

Since Mr. Malsin's affidavit was prepared the plaintiff has also obtained copies of a number of other advertisements published by the defendant in the Los Angeles Times and the Los Angeles Examiner. Copies of these advertisements are attached hereto, marked Exhibit "A", and made a part hereof. In seventeen of these advertisements the defendant uses the phrase "Mother-to-be" in conjunction with its name Maternity Lane Ltd. of California; in nine of them it solicits mail-order business; and in eight of them prints mail-order coupons.

HAROLD F. BIRNBAUM

Subscribed and sworn to before me this 30th day of September, 1947.

(Seal)

J. E. HIGGINS

Notary Public in and for the Said County and State

My Commission Expires May 9, 1950.

* * * * *

[Endorsed]: Filed Oct. 2, 1947. Edmund L. Smith, Clerk.

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS

To the Plaintiff Above Named and to Loeb and Loeb, Its Attorneys:

You, and Each of You Will Please Take Notice, that on the 27th day of October, 1947, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the Court Room of Honorable Peirson M. Hall, Judge of the above named court, a motion will be made to dismiss the action pursuant to rule 12(b) of the Federal Rules of Civil Procedure, on the ground that the complaint filed herein fails to state a claim against defendants upon which relief can be granted.

Dated October 17th, 1947.

H. MILES RASKOFF

Attorney for Certain Defendants

Received copy of the within Notice of Motion to Dismiss this 17th day of October, 1947. Loeb & Loeb, per H. F. Brinker, Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1947. Edmund L. Smith, Clerk. [11]

[Title of District Court and Cause]

AFFIDAVIT OF JACK LANE, JR., IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS
AND IN OPPOSITION TO PLAINTIFF'S MO-
TION FOR PRELIMINARY INJUNCTION

State of California

County of Los Angeles—ss.

Jack Lane, Jr., being first duly sworn, deposes and says:

I am President of the defendant Maternity Lane, Ltd. (sued herein as Maternity Lane, Ltd. of California) and one of the individual defendants herein. At all times herein mentioned I have been, and I now am, active in the management of the business of said corporate defendant. The corporate defendant is a close corporation with all of its stock being owned by members of the Lane family.

Said corporate defendant has been since its inception, and it now is, engaged exclusively in the sale at retail, of maternity apparel—no other kind of merchandise is sold by defendant. Defendant's corporate name and the name under which it does business, to-wit: "Maternity Lane, Ltd." was selected without any reference whatsoever to plaintiff's name. Said name is simply a combination of the word describing the type of business carried on and the surname of the family which owns all the stock of the corporate defendant. It was selected solely and exclusively because the officers and stockholders felt that said name succinctly described the proposed business activity in a pleasant, distinctive and appropriate manner.

The use of a long-hand type script in defendant's advertising material until on or about the first week of September, 1947, shortly after plaintiff made known an objection to that type of script, was the result of affiant's choosing from several sample advertising lay-outs submitted, and the choice was based solely on the fact that I deemed this type of printing to be more attractive than the other samples submitted to me. At no time did I refer to plaintiff's advertising material in connection with defendants' advertising until my counsel advised me that plaintiff took the position that the use of said script was in some way violative of plaintiff's rights.

All discussions and correspondence with plaintiff and its counsel concerning plaintiff's claim of unfair competition was handled for defendants by one of defendants' counsel, Max L. Raskoff. When Mr. Raskoff informed me, during the month of August, 1947, that plaintiff made some objection to the use of script lettering in defendants' advertising, I immediately discontinued the use of script in defendants' advertising. Prior to the time when plaintiff made known its objection to the use of script, defendants had not consistently and exclusively used script type lettering in its advertising nor did defendants use the same type of script in the advertising material wherein script was used, as appears clearly from "Exhibit A" to the affidavit of Harold F. Birnbaum filed by plaintiff herein.

Affiant selected the sign which is affixed to defendants' store, a picture of which is attached to Mr. Malsin's affidavit filed herein by plaintiff and marked "Exhibit H" hereto. The choice of the particular type of lettering used in said sign was made from two samples submitted to me and I selected the particular type used for the

reason that it was more attractive than the block type lettering of the second sample.

Affiant has used the phrases "Mother-to-be" and "Mothers-to-be" in defendants' advertising material merely because those phrases are among the very few phrases which describe the persons to whom defendants' advertising is directed. Said phrases are commonly used in the maternity apparel business by many firms in advertising the sale of maternity apparel. The phrase has been used by such large retailing and mail order institutions as Sears, Roebuck & Co., Montgomery Ward & Co.

Since the filing of this action affiant has examined several mail order catalogs published by Sears, Roebuck and Co. and Montgomery Ward & Co. and I have found therein that the phrases "Mother-to-be" and "Mothers-to-be" are frequently used in advertising the sale of maternity apparel. Attached hereto and marked "Exhibit A" is a copy of a page from the 1947-1948 Fall and Winter Catalog published by Sears, Roebuck and Co. wherein the phrase "Mother-to-be" is prominently used. My examination of the 1942-1943 Fall and Winter Catalog published by the same company revealed the use of the phrase "Mothers-to-be" on page 262B thereof and again on page 262C in connection with advertising the sale of maternity apparel. I found the phrase "Mother-to-be" used in the same connection at page 72 of the 1947-1948 Fall and Winter Catalog just published by Montgomery Ward & Co.; the phrase has been used by said company at least as far back as 1940 inasmuch as I saw the phrase used on page 154 of the 1940 Spring and Summer mail order catalog of Montgomery Ward & Co. Attached hereto and marked "Exhibit B" are specimens of

advertising of other retailers, including such organizations as the May Co., where I found said phrases prominently used.

While the corporate defendant has been sued herein under the name "Maternity Lane, Ltd. of California," the true and correct name is simply "Maternity Lane, Ltd." Since the defendants have undertaken advertising in certain national magazines the words "of California" have been added to defendants' corporate name to identify the geographical location of defendants.

At no time have defendants, or any of them, intended or attempted to pirate, copy or simulate any of plaintiff's trademarks, slogans, lettering or advertising; nor have defendants, or any of them, at any time, intended or attempted to confuse or mislead any customers of either plaintiff or defendants or any members of the public concerning defendants' identity.

JACK LANE, JR.

Subscribed and sworn to before me this 17th day of October, 1947.

(Seal)

GEORGE J. TAPPER

Notary Public in and for the County of Los Angeles,
State of California.

* * * * *

Received copy of the within Affidavit of Jack Lane, Jr., etc., this 17th day of October, 1947. Loeb & Loeb, per H. F. Brinker, Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1947. Edmund L. Smith, Clerk.

[Title of District Court and Cause]

AFFIDAVIT OF MAX L. RASKOFF IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS
AND IN OPPOSITION TO PLAINTIFF'S MO-
TION FOR PRELIMINARY INJUNCTION

State of California

County of Los Angeles—ss.

Max L. Raskoff, being first duly sworn, deposes and
says:

I am a member of the Bar of the State of California
and since the month of February, 1946 I have given the
defendants herein advice and counsel in connection with
the claim asserted by plaintiff against defendants, on or
about said date and again asserted in the case at bar.

I have read the affidavit of Raphael Bryant Malsin,
filed in this cause in support of plaintiff's motion for pre-
liminary injunction and am familiar with the contents
thereof. On line 24, page 7 of said affidavit it is alleged
that no reply was ever received to the telegram and letter
dated February 15, 1946 ("Exhibits [12] K and L" to
said affidavit) sent the defendants by plaintiff's New York
counsel. Shortly after receipt of said telegram and letter
by defendants they were referred to me for reply. On the
26th day of February, 1946 I sent a written reply to
plaintiff's New York counsel in which I informed plaintiff
of my opinion that defendants' engagement in business
under its corporate name constituted no infringement of
plaintiff's trade-mark nor unfair competition with plain-

tiff. Said letter was properly addressed, with postage fully prepaid and was deposited in the United States mail at Los Angeles, California, on or about the 26th day of February, 1946. Although the envelope containing said reply contained affiant's name and address, it was never returned to affiant. A copy of said letter is attached hereto and marked "Exhibit A."

No further communication was received from plaintiff or its counsel until defendant received from plaintiff's Los Angeles counsel the letter dated January 7, 1947, a copy of which is attached to Mr. Malsin's affidavit filed herein and marked "Exhibit M" thereto. Upon receipt of the aforesaid letter, which was approximately eleven months after receipt of the first letter and telegram, I had numerous discussions with plaintiff's Los Angeles counsel concerning the said controversy, and, at no time during any of the said discussions was any mention ever made of any alleged resemblance between the script used by plaintiff and defendants in their respective advertising until some time during the month of August, 1947. In the said discussions plaintiff's counsel took the position that the name "Maternity Lane" was of itself an infringement of and in unfair competition with the name "Lane Bryant" and I took the contrary position throughout said discussions. Some time during the month of August, 1947, plaintiff's counsel, during the course of one such discussion, asserted that plaintiff and defendants used similar script in their advertising material and plaintiff took the position that this alleged similarity constituted a

violation [13] of plaintiff's rights. I informed plaintiff's counsel that in my opinion there was no similarity and no violation of plaintiff's rights, but upon informing defendants' officers of plaintiff's contention, defendants voluntarily ceased using script in any of its advertising material thereafter.

At no time during any of my numerous discussions with plaintiff's counsel did plaintiff ever make any mention or contention with respect to the use of the phrase "Mother-to-be" or "Mothers-to-be" as used by either plaintiff or defendants in their advertising material. The first time any such assertion was made by plaintiff was in the papers filed herein.

MAX L. RASKOFF

Subscribed and sworn to before me this 17th day of October, 1947.

(Seal)

GEORGE J. TAPPER

Notary Public in and for the County of Los Angeles,
State of California [15]

EXHIBIT "A"

MAX L. RASKOFF

Attorney-at-Law

621 Roosevelt Building

727 West Seventh St.

Los Angeles 14, California

TRinity 5385

February 26th, 1946

Messrs. Spiro, Felstiner & Prager

Counselors at Law

270 Madison Avenue

New York 16, New York

Gentlemen:

My client, Maternity Lane, Ltd. of this city has consulted with me regarding your letter to it of February 15, 1946.

This is to inform you that I have advised my client that in conducting its business under its trade name there is no infringement of your client's trademark nor unfair competition with your client.

Very truly yours,

/S/ MAX L. RASKOFF

MLR:m [15]

Received copy of the within Affidavit of Max L. Raskoff, etc., this 17th day of Oct., 1947. Loeb & Loeb, per H. F. Brinker, Attorneys for Plaintiff.

[Endorsed]: Filed Oct 17, 1947. Edmund L. Smith, Clerk. [16]

[Title of District Court and Cause]

COUNTER-AFFIDAVIT OF HAROLD F. BIRN-
BAUM IN SUPPORT OF MOTION FOR PRE-
LIMINARY INJUNCTION

State of California

County of Los Angeles—ss.

Harold F. Birnbaum, being first duly sworn deposes and says:

I am a member of the firm of Loeb and Loeb and am counsel for the plaintiff in the above entitled action.

I have read the "Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction" filed in this cause by defendants and am familiar with the contents thereof. On page 1 of said memorandum defendants contend that plaintiff has been guilty of laches in that a period of nineteen months elapsed between the time plaintiff first made known its position and the filing of its complaint herein.

That on January 7, 1947, affiant wrote defendants informing [17] them that unless they ceased the use of the trade name "Maternity Lane", plaintiff would institute legal action to enjoin their use of said trade name. (See Exhibit M of the affidavit of Raphael Bryant Malsin, filed in this cause by plaintiff in support of its motion for a preliminary injunction.)

That subsequently affiant had numerous telephone conferences with Max L. Raskoff, attorney for defendants;

that settlement offers and counter-offers were considered and ultimately rejected by both parties; that these conferences were continued by affiant in the hope that defendants would reduce their demands so that this controversy could be settled and litigation avoided.

That plaintiff's complaint, motion for preliminary injunction and affidavits in support of motion for preliminary injunction were prepared during the summer of 1947 immediately after negotiations for amicable settlement of this controversy failed; that in September, 1947 affiant gave copies of said pleadings and affidavits to Max L. Raskoff, defendants' attorney, for consideration by defendants in a final effort to induce defendants to reduce their demands and in order that the controversy could be settled without subjecting the parties to the expense of litigation.

HAROLD F. BIRNBAUM

Subscribed and sworn to before me this 31st day of October, 1947.

(Seal)

J. E. HIGGINS

Notary Public in and for the Said County and State.

My Commission Expires May 9, 1950. [18]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 5, 1947. Edmund L. Smith, Clerk. [19]

[Title of District Court and Cause]

AFFIDAVIT OF WILLIAM FELSTINER IN SUP-
PORT OF PLAINTIFF'S MOTION FOR PRE-
LIMINARY INJUNCTION

State of New York

County of New York—ss.

William Felstiner, being duly sworn deposes and says:

I am a member of the firm of Spiro, Felstiner & Prager of New York City, New York counsel for plaintiff herein. I have read the affidavit of Max L. Raskoff filed herein in which the statement is made (page 2, lines 3-13) that on February 26, 1946, an answer was forward by him to Spiro, Felstiner & Prager, replying to the telegram and letter from my firm dated February 15, 1946 (Exhibits K and L to Affidavit of Raphael Bryant Malsin, filed herein). In this connection Mr. Raskoff attaches to his affidavit as Exhibit "A" a copy of said purported answer.

My firm never received the alleged answer referred to by [20] Mr. Raskoff.

WILLIAM FELSTINER

Subscribed and sworn to before me this 27th day of October, 1947.

(Seal)

LILLIAN YAMPOLE

Notary Public in the State of New York, Residing in
New York County. N. Y. Co. Clk's No. 22, Reg. No.
52-Y-8. Kings Co. Clk's No. 10, Reg. No. 36-Y-8.
Commission Expires March 30, 1948. [21]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 5, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

MINUTE ORDER

Hall, J.

From the complaint and affidavits on file, I cannot see the slightest possibility of a misleading or deceptive statement, insofar as the plaintiff's name or business is concerned, in either the name of the defendants, or the use by the defendants in their business of the words "maternity", "mother", "mother-to-be", "motherhood", or the picture of a "stork", or the picture of a clothed pregnant woman. Both the words and the ideas back of them have been so long in the public domain, as well as the use of special clothing during pregnancy, as to preclude relief under the plaintiff's complaint, or the motion for temporary restraining order and the affidavits filed. Nor does the use of the word "Lane" by the defendant indicate any basis for relief under plaintiff's complaint and affidavits.

The Motion for Injunction is denied.

The Motion to Dismiss is granted.

Defendant will prepare the appropriate Findings and Order [23] on the denial of Injunction and the appropriate Judgment of Dismissal.

Los Angeles, California, January 12, 1948.

[Endorsed]: Filed Jan. 12, 1948. Edmund L. Smith.
Clerk. [24]

[Title of District Court and Cause]

PLAINTIFF'S OBJECTION TO DEFENDANTS'
PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW

Plaintiff objects to defendants' proposed findings of fact and conclusions of law in the following particulars:

- 1) Paragraph IX of the proposed findings of fact.
- 2) Paragraph III of the proposed conclusions of law.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The finding as to defendants' fraudulent intent contained in paragraph IX of the proposed findings of fact is objected to on the ground that the issue of whether or not the corporate defendant intended or attempted to pass itself off as plaintiff was controverted in the affidavits before the Court, there has been no examination or cross-examination of witnesses on this issue, and the Court has given no indication in its Minute Order as to any finding [25] on the issue. Moreover, a finding on the issue of fraudulent intent is immaterial and not appropriate to the Court's order denying the motion for preliminary injunction since that order is based on the Court's decision that the names used in business by plaintiff and defendants are not similar; and intent therefore becomes immaterial. Nor is a finding of fraudulent intent necessary for the decision of plaintiff's motion for preliminary injunction herein. Cf. *Brooks Bros. v. Brooks Clothing Co.* of

California, 60 F. Supp. 442, 451 (S. D. Cal., 1945), affirmed, 158 F. (2d) 798 (C. C. A. 9th, 1947) (adopting the District Court opinion), cert. denied, 328 U. S. 217 (1947); *Hoover Co. v. Groger*, 12 C. A. (2d) 417, 419, 55 P. (2d) 529 (1936).

II.

The finding, contained in paragraph IX of the proposed findings of fact, that plaintiff has not alleged that any members of the public have been confused or misled with respect to the identity of the corporate parties to this action is improper since what the plaintiff did not allege, and therefore defendants could not, and did not controvert or admit, is not before the Court; and there should not be a finding as to a fact about which there is nothing in the record. Moreover, such a finding is unnecessary since actual confusion or deception is unnecessary even as to an order granting a preliminary injunction. Cf. *Academy of Motion Picture Arts and Sciences v. Benson*, 15 C. (2d) 685, 691-92, 104 P. (2d) 650-653 (1940); *Wilys Overland Co. v. Akron-Overland Tire Co.*, 268 Fed. 151 (D. C. Del., 1920), affirmed, 273 Fed. 674 (C. C. A. 3d, 1921).

III.

Plaintiff objects to paragraph III of proposed conclusions of law on the ground that there are no findings of fact by the Court to support the conclusions of law that plaintiff has been guilty of laches. Nor is the Court's denial of plaintiff's motion for preliminary injunction

based on the ground that plaintiff was guilty of [26] laches.

IV.

Rule 52(a) of the Federal Rules of Civil Procedure only requires the Court, in granting or refusing interlocutory injunctions, to set forth the findings of fact and conclusions of law which constitute the grounds of its action. The Court need not and should not make findings on the merits but only on the issues appropriate to the interlocutory proceeding. *Cone v. Rorick*, 112 F. (2d) 896-97 (C. C. A. 5th, 1940). Cf. *Public Service Commission v. Wisconsin Telephone Co.*, 289 U. S. 67 (1923).

Respectfully submitted,

LOEB AND LOEB

By Milton A. Rudin

Attorneys for Plaintiff [27]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 24, 1948. Edmund L. Smith,
Clerk [28]

[Title of District Court and Cause]

MEMORANDUM IN SUPPORT OF FINDING AND
CONCLUSION OBJECTED TO BY PLAINTIFF

Defendant has, pursuant to the Minute Order entered by the Court herein on January 12, 1948, and pursuant to Rule 52a of the Federal Rules of Civil Procedure, prepared and filed Findings of Fact and Conclusions of Law upon the Court's denial of plaintiff's motion for preliminary injunction and served a copy of said proposed Findings and Conclusions upon counsel for plaintiff, and plaintiff's counsel has, in accordance with the provisions of Rule 7a of the Rules of the United States District Court for the Southern District of California, acknowledged service of said proposed Findings and Conclusions and filed objections thereto. Plaintiff's objections are specifically directed to paragraph IX of the proposed Findings [29] of Fact, and paragraph III of the proposed Conclusions of Law; plaintiff has made no objection to any of the other proposed Findings and Conclusions. This memorandum is submitted on behalf of defendants in support of the Finding and the Conclusion to which plaintiff objects.

I.

Plaintiff objects to proposed Finding IX on the ground that the Court gave no indication in its Minute Order that the denial of the motion for preliminary injunction was based upon a finding of the good faith of defendant. As is pointed out on page 1 of plaintiff's memorandum setting forth its objections to the proposed finding, the issue of whether or not the corporate defendant intended or attempted to pass itself off as plaintiff was before the Court

in the form of contradictory affidavits filed by the respective parties.

Plaintiff alleged in paragraph XIV of its complaint that "defendants in the conduct of their business are endeavoring to pass themselves off as being connected with plaintiff in a manner and with the intent to deceive the public, and to cause the public to believe that maternity apparel sold by plaintiff can be purchased at the retail store of said defendant or by mail order from it". Again, in paragraph XV of plaintiff's complaint, it is alleged that defendants have "intensified their simulation of plaintiff and plaintiff's corporate name and trade mark".

In the affidavit of Raphael Bryant Malsin filed by plaintiff in support of its motion for preliminary injunction, there are numerous similar allegations concerning the intent of defendants. Thus, on lines 25 to 27 of page 6 of said affidavit, the affiant states "defendant is increasing its effort to hold itself out as being connected with plaintiff, and imitate plaintiff's name and slogan". On page 8, lines 2 to 8 of the same affidavit, the affiant sets forth a similar contention with respect to defendant's intent. [30]

The foregoing contentions of plaintiff as to defendant's lack of good faith are directly and specifically contradicted in the affidavit of Jack Lane, Jr., filed by defendants in opposition to plaintiff's motion for preliminary injunction, when the affiant states on lines 8 to 13 of page 4, "at no time have defendants, or any of them, intended or attempted to pirate, copy or simulate any of plaintiff's trade marks, slogans, lettering or advertising; nor have defendants, or any of them, at any time intended or attempted to confuse or mislead any customers of either plaintiff or defendants or any members of the public concerning defendants' identity".

Thus, the issue of defendants' intention and good faith was before the Court upon the motion for preliminary injunction and it is respectfully submitted that defendants are entitled to a finding on this issue of fact. Plaintiff has, in its pleadings and affidavits filed on its behalf, and in its Memorandum of Points and Authorities in support of its motion for preliminary injunction, stressed and relied on the allegation that defendant's acted in bad faith in selecting their name and in their advertising material.

On page 2 of plaintiff's Memorandum of Points and Authorities in support of its motion for preliminary injunction, plaintiff's entire statement of facts of the instant case emphasizes the alleged bad faith of defendants. Although positive proof of bad faith is not necessary to establish a cause of action if the conduct complained of is likely to mislead or cause confusion amongst members of the public, *Academy of Motion Picture Arts & Sciences v. Benson*, 15 Cal. (2d) 685; *Sun Maid Raisin Growers v. Mossesion*, 84 Cal. App. 485; *Del Monte Special Food Co. v. California Packing Corp.*, 34 Fed. (2d) 774, the question of the defendants' good faith is an important issue upon a motion for preliminary injunction. *British American Tobacco Co. v. British American Cigar Co.*, 211 Fed. 933.

Moreover, the recent decision of the 9th Circuit Court of Appeals in the case of *Lerner Stores Corporation v. Lerner*, 162 Fed. [31] (2d) 160, indicates that the Court placed great importance upon the acts of the defendant evidencing his good faith. Even the cases holding that proof of bad faith is not necessary to establish a cause

of action for unfair competition give, as the reason for the rule, that bad faith "may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be deceived by imitation of a trademark." *Sun Maid Raisin Growers v. Mossesion*, 84 Cal. App. 485 at 497; *California Prune Association v. Nicholson Co.*, 69 Cal. App. (2d) 207 at 220.

Conversely, it follows that where the facts indicate that a purchaser, exercising ordinary care, would not be likely to be deceived, it may be assumed that the defendant has not acted in bad faith. This assumption may well be one of the grounds upon which the Court in the instant case, reached the conclusion announced in its Minute Order of January 12, 1948. While it is true, as plaintiff sets forth in its memorandum in support of its objections, the Court did not, in its Minute Order, specifically mention the good faith of defendants, it would seem that the Court's statement in its Minute Order that there is not "the slightest possibility of a misleading or deceptive statement in so far as the plaintiff's name or business is concerned in either the name of the defendants" or their use of certain advertising material is based upon a determination of fact that the defendants did not intend or attempt to pass themselves off as plaintiff. Certainly, had the defendants intended or attempted to pass themselves off as plaintiff they would have selected a name and used advertising material which were similar to those used by plaintiff so as to confuse and mislead members of the public. In view of the conflicting affidavits, this inference follows naturally and logically from the Court's conclusion, as expressed in its Minute Order, so as to resolve the conflict in favor of defendants and support proposed Finding IX to which plaintiff objects. [32]

II.

Plaintiff also objects to the last portion of proposed Finding IX. The proposed Finding merely sets forth that plaintiff has not alleged that any members of the public have been confused or misled with respect to the identity of the corporate parties to this action. The papers filed in this cause leave such a finding completely uncontroverted. Nowhere in any of the numerous papers filed by plaintiff is there a single mention or even a suggestion that there has been any actual confusion amongst members of the public in dealing with the corporate parties to the action. Plaintiff merely contended that there was such a similarity of names that confusion would be the natural result.

Had there been allegations of actual confusion or deception and had plaintiff submitted evidence to the Court of such actual confusion or deception, it is conceivable that the Court might have concluded that there was such a similarity of names as to justify a preliminary injunction. Accordingly, defendants should be entitled to a finding such as that proposed to the effect that there was no such showing made by plaintiff.

III.

Plaintiff objects to paragraph III of the proposed Conclusions of Law on the ground that there are no Findings of Fact by the Court to support the Conclusion of Law that plaintiff has been guilty of laches.

Finding X, to which plaintiff has made no objection, fully supports the conclusion of laches. Indeed, plaintiff could not have raised any objection to proposed Finding X inasmuch as said proposed Finding is based exclusively upon facts set forth in the papers filed by plaintiff in

support of its motion for preliminary injunction. Proposed Finding X is based upon Mr. Malsin's affidavit filed by plaintiff (page 7, lines 19-28) and the exhibits attached thereto (Exhibits "K", "L" and "M") which show that on the date defendants [33] first opened their business in February of 1946, plaintiff made formal written protest of the name to be used and which was subsequently used by defendants in the carrying on of their business. The allegations of the complaint and of Mr. Malsin's affidavit further show that despite subsequent protests, defendants refused to make any change in the name under which they did business, and yet, plaintiff did not file this action until October 2, 1947, a period of approximately nineteen months after plaintiff first had knowledge of the name under which defendants did business.

As set forth on pages 1 and 2 of defendants' Memorandum of Points and Authorities in opposition to plaintiff's motion for preliminary injunction which was filed in this cause on October 17, 1947, laches is a defense to a request for preliminary injunction in cases involving alleged unfair competition or trademark infringement. *Estes v. Worthington*, 22 Fed. 822; *C. O. Burns Co. v. W. F. Burns Co.*, 118 Fed. 944; *Havana Commercial Co. v. Nichols*, 155 Fed. 302; *Best Foods v. Hemphill Packing Co.*, 295 Fed. 425; *Quigley Publishing Co. v. Showmen's Round Table*, 7 Fed. Supp. 410.

A finding and conclusion on the issue of laches is warranted inasmuch as laches was one of the grounds upon which defendants opposed the motion for preliminary injunction. (See pages 1 and 2 of Defendants' Memorandum of Points and Authorities in opposition to plaintiff's motion for preliminary injunction.) The cases above cited

were the authorities relied upon. Nor would such a Finding and Conclusion, in any way, be an adjudication on the merits of the controversy (as is apparently contended by plaintiff in its objection to the proposed Finding, page 3, lines 6, 7 and 8) inasmuch as laches is no defense to a permanent injunction. *Brooks Bros. v. Brooks Clothing Co. of California*, 60 Fed. Sup. 442, *affd.* 158 Fed. (2d) 798, *cert. den.* 328 U. S. 217.

Notwithstanding the fact that the Minute Order entered by the Court made no mention of the question of laches, we submit that [34] a finding and conclusion on this issue are fully supported by the uncontradicted statements filed by plaintiff which were before the Court on the motion and that such a finding and conclusion would, of themselves, amply support the Court's decision on the motion for preliminary injunction and that defendants are entitled to a finding and conclusion thereon.

It is respectfully submitted that the Findings of Fact and Conclusions of Law on plaintiff's motion for preliminary injunction, as prepared and submitted by defendants, including proposed Finding IX and proposed Conclusion III, should be signed and approved.

Dated, this 28th day of January, 1948.

H. MILES RASKOFF

Attorney for Certain Defendants [35]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 4, 1948. Edmund L. Smith, Clerk. [36]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON MOTION FOR PRELIMINARY IN-
JUNCTION

FINDINGS OF FACT

I.

Plaintiff has been and it now is a corporation organized and existing under the laws of the State of Delaware.

II.

Plaintiff has been for many years and it is now engaged in business under the name and style of Lane Bryant, its corporate name being Lane Bryant, Inc. Lane Bryant is the name of the founder of plaintiff's business, and the name, Lane Bryant, was registered as a trade mark in the United States Patent Office on October 20, 1927, and issued as a trade mark on February 14, 1928. [37]

III.

Plaintiff maintains its principal place of business in the City of New York, State of New York and operates stores and departments in other stores in many cities located in the eastern and midwestern states of the United States. Plaintiff maintains a mail order house in the City of Indianapolis, State of Indiana, from which it conducts a mail order business throughout the United States and Canada. In each location where plaintiff is doing business it has used and is using its name and registered trade mark.

IV.

Plaintiff's business consists in the sale at retail and by mail order of women's wear, specializing in apparel for

stout women and in maternity apparel, 5% of its business being the sale of maternity apparel. In 1946 plaintiff did in excess of Forty Million (\$40,000,000) Dollars worth of business of which twenty-five (25%) per cent were mail order sales.

V.

The corporate defendant has been and it now is a corporation organized and existing under the laws of the State of California. The officers of the corporate defendant are Jack Lane, Jr., Jane Lane and Lucille Lane, and they and each of them have been and they now are residents of the State of California. The corporate defendant is a closely held family corporation with all of its stock being owned by members of a family having the surname of Lane.

VI.

The corporate defendant has been since the month of February, 1946, and it now is engaged in business in the City of Los Angeles, County of Los Angeles and State of California under the name and style of Maternity Lane, its corporate name being Maternity Lane Ltd.

VII.

The corporate defendant maintains its single place of [38] business in the City of Los Angeles, State of California, where it is engaged exclusively in the sale at retail of maternity apparel, and also conducts a mail order business soliciting orders through national advertising.

VIII.

Plaintiff and the corporate defendant engage in newspaper and magazine advertising and each has used a script-type lettering in displaying their respective names

and in their advertising material, and both have used the phrase "mother-to-be" and "mothers-to-be" in their advertising material. The corporate defendant has, on occasion, used several types of lettering other than script-type in displaying its name and in its advertising material. After the first week of September, 1947, defendants discontinued the use of script-type lettering in their advertising material.

IX.

The corporate defendant has not intended or attempted to pass itself off as plaintiff nor has plaintiff alleged that any members of the public have been confused or misled with respect to the identity of the corporate parties to this action.

X.

Plaintiff had knowledge of the name and the business activity of the defendants since on or about February 15, 1946, and on that date and on several occasions thereafter, plaintiff protested to the defendants of the use by defendants of the name "Maternity Lane" in connection with the sale of maternity apparel. After negotiations between the parties defendants refused to make any changes in the name under which they did business, whereupon plaintiff commenced this action on October 2, 1947.

CONCLUSIONS OF LAW

I.

The names used in business by plaintiff and defendants are not similar and the public is not likely to be confused or misled thereby. [39]

II.

The words "maternity", "mother", "mother-to-be", "mothers-to-be", "motherhood", the picture of a stork and the picture of a clothed pregnant woman are merely descriptive and cannot be exclusively appropriated as part of a trade name; nor have the aforesaid words or pictures acquired a secondary meaning associated with plaintiff.

III.

Plaintiff has been guilty of laches with respect to seeking to enjoin defendant from using the name "Maternity Lane" in connection with the sale of maternity apparel.

IV.

There is no such similarity of names as to present a case which is clear and free from reasonable doubts.

V.

Plaintiff is not entitled to a preliminary injunction.
Dated this 3 day of Feb., 1948.

PEIRSON M. HALL
United States District Judge.

Approved as to form:

LOEB AND LOEB

By H. F. Birnbaum

Attorneys for Plaintiff [40]

Received copy of the within Findings of Fact and Conclusions of Law this 22nd day of January, 1948. Loeb & Loeb, by H. F. Birnbaum, Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 4, 1948. Edmund L. Smith, Clerk. [41]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 7664-PH

LANE BRYANT, INC., a corporation,

Plaintiff,

vs.

MATERNITY LANE LTD. OF CALIFORNIA, a
corporation; JACK LANE, JR.; JANE LANE;
LUCILLE LANE; JOHN DOE ONE; and JOHN
DOE TWO,

Defendants.

ORDER DENYING PRELIMINARY INJUNCTION

This cause coming on regularly to be heard upon the motion of plaintiff for preliminary injunction, and upon plaintiff's verified complaint, and upon affidavits filed on behalf of plaintiff and defendants, and after hearing counsel for the respective parties the motion was duly submitted to the Court for decision. The Court having heretofore issued its Minute Order denying said motion and having made Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed, that plaintiff's motion for preliminary injunction be, and it hereby is, denied.

Dated this 3rd day of Feb., 1948.

PEIRSON M. HALL

United States District Judge

Approved as to form: Loeb and Loeb, by H. F. Birnbaum, Attorneys for Plaintiff.

Judgment entered Feb. 4, 1948. Docketed Feb. 4, 1948. Book 48, page 338. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Feb. 4, 1948. Edmund L. Smith, Clerk. [42]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 7664-PH

LANE BRYANT, INC., a corporation,

Plaintiff,

vs.

MATERNITY LANE LTD. OF CALIFORNIA, a
corporation; JACK LANE, JR.; JANE LANE;
LUCILLE LANE; JOHN DOE ONE; and JOHN
DOE TWO,

Defendants.

JUDGMENT OF DISMISSAL

The cause came on regularly to be heard upon defendants' motion that the same be dismissed on the ground that the complaint filed herein failed to state a claim against defendants upon which relief can be granted. The Court, having duly heard and considered the affidavits, proofs, papers and arguments of the parties respectively, granted the motion.

Wherefore, It Is Ordered, Adjudged and Decreed, that the action be and the same is hereby dismissed on the merits, and that defendant recover of the plaintiff its costs.

Dated this 3rd day of Feb., 1948.

PEIRSON M. HALL

United States District Judge

Approved as to form: Loeb and Loeb, by H. F. Birnbaum, Attorneys for Plaintiff.

Judgment entered Feb. 4, 1948. Docketed Feb. 4, 1948. C. O. Book 48, page 337. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Feb. 4, 1948. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Notice is hereby given that Lane Bryant, Inc., a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying plaintiff's motion for preliminary injunction entered in this court on February 4, 1948, in Civil Order Book 48, at page 338, and from the final judgment entered in this court on February 4, 1948, in Civil Order Book 48 at page 337.

Dated: March 4, 1948.

LOEB AND LOEB

By Milton A. Rudin

Attorneys for Plaintiff [14]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mld. copy to H. Miles Raskoff, Deft's Atty., Mar. 5, 1948. Edmund L. Smith, Clerk. [45]

In the United States District Court in and for the
Southern District of California
Central Division

No. 7664-PH

LANE BRYANT, INC., a corporation,

Plaintiff,

vs.

MATERNITY LANE LTD. OF CALIFORNIA, a
corporation; JACK LANE, JR., JANE LANE and
LUCILLE LANE,

Defendants.

BOND FOR COSTS ON APPEAL

The undersigned hereby acknowledge that Lane Bryant, Inc., a Delaware corporation, as principal, and Royal Indemnity Company, a New York corporation, duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the State of California, as surety, are held and truly bound unto Maternity Lane Ltd. of California, a California corporation, Jack Lane, Jr., Jane Lane and Lucille Lane, defendants in the within action, their successors or assigns, in the sum of \$250.00 lawful money of the United States of America, for the payment of which well and truly to be made we hereby bind ourself, our successors and assigns, as the case may be, jointly and severally.

Whereas, on February 4, 1948, in an action pending in the above-entitled court between Lane Bryant, Inc., a Delaware [46] corporation, as plaintiff, and Maternity Lane Ltd. of California, a California corporation, Jack Lane, Jr., Jane Lane and Lucille Lane, as defendants, an

order denying said plaintiff's motion for preliminary injunction and a judgment against said plaintiff were entered, and the said plaintiff having filed a notice of appeal from such order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said plaintiff shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the order and judgment affirmed, or such costs as the said Circuit Court of Appeals may award against the said plaintiff if the judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

Dated: March 5th, 1948.

(Seal) ROYAL INDEMNITY COMPANY

By Elmer E. Fitz

Its Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 5th day of March in the year 1948, before me, Hannah Waterman, a Notary Public in and for the County and State aforesaid, personally appeared Elmer E. Fitz, known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Royal Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as principal, and his own name as Attorney-in-Fact.

(Seal)

HANNAH WATERMAN

Notary Public in and for Said County and State

My com. expires 7/13/51.

Examined and recommended for approval as provided in Rule 8. Loeb and Loeb, by Milton A. Rudin, Attorneys for Plaintiff.

Approved 3-5-48. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by Wm. A. White, Deputy.

[Endorsed]: Filed Mar. 5, 1948. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME TO FILE RECORD ON APPEAL AND TO DOCKET THE APPEAL

It Is Hereby Stipulated by and between the parties hereto. through their respective counsel, that the time within which the record on appeal from the Order Denying Plaintiff's Motion for Preliminary Injunction and from the Judgment must be filed, and the appeal docketed with the Circuit Court of Appeals, may be extended to and including June 3, 1948. Notice of said appeal was filed March 5, 1948.

Dated: April 8, 1948.

LOEB AND LOEB

By Milton A. Rudin
Attorneys for Plaintiff

H. MILES RASKOFF

Attorney for Defendants

[Endorsed]: Filed Apr. 12, 1948. Edmund L. Smith, Clerk. [48]

[Title of District Court and Cause]

ORDER EXTENDING TIME TO FILE RECORD
ON APPEAL AND TO DOCKET THE AP-
PEAL

It having been stipulated by and between the parties that the time within which the record on appeal from the Order Denying Plaintiff's Motion for Preliminary Injunction and from the Judgment must be filed, and the appeal docketed with the Circuit Court of Appeals, may be extended to and including June 3, 1948, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing the record on appeal, and for docketing the appeal in the above-entitled cause with the Circuit Court of Appeals, be and is hereby extended to and including June 3, 1948.

Dated: April 12, 1948.

PEIRSON M. HALL

United States District Judge

[Endorsed]: Filed Apr. 12, 1948. Edmund L. Smith,
Clerk. [49]

[Title of District Court and Cause]

NOTICE OF SUBSTITUTION OF ATTORNEYS

To the Defendants Above Named and to H. Miles Ras-
koff, Esq., Their Attorney:

You Will Please Take Notice that McCutchen, Thomas, Matthew, Griffiths & Greene and Harold A. Black, 704 Roosevelt Building, 727 West Seventh Street, Los An-

geles 14, California, telephone Vandike 3186, have been substituted as attorneys for plaintiff herein in the place and stead of Loeb & Loeb.

LOEB & LOEB

By Harold F. Birnbaum

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

By Harold A. Black

Dated: May 24, 1948.

[Endorsed]: Filed May 25, 1948. Edmund L. Smith,
Clerk. [50]

[Title of District Court and Cause]

STIPULATION FOR TRANSMISSION OF CER-
TAIN ORIGINAL PAPERS AS PART OF REC-
ORD ON APPEAL

It Is Hereby Stipulated and Agreed that in lieu of transmitting copies, the Clerk of this Court shall transmit to the Circuit Court of Appeals for the Ninth Circuit, as part of the record on appeal herein, the following original documents:

1. Affidavit of Raphael Bryant Malsin in support of preliminary injunction, and all exhibits attached thereto, filed October 2, 1947.
2. Affidavit of Harold F. Birnbaum in support of motion for preliminary injunction, and all exhibits attached thereto, filed October 2, 1947.

3. Affidavit of Jack Lane, Jr., in support of defendants' motion to dismiss and in opposition to plaintiff's motion for preliminary injunction, and all exhibits attached thereto, filed October 17, 1947. [51]

The reason for the foregoing stipulation is that the documents above mentioned have attached thereto numerous exhibits, the reproduction of which would be difficult and expensive, and it is thought desirable to make appropriate arrangements with the Clerk of the Circuit Court of Appeals for the printing and reproduction of such parts of said documents as may be practicable.

Dated: May 24, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

Attorneys for Plaintiff and Appellant

H. MILES RASKOFF

Attorney for Defendants and Appellees

It Is So Ordered:

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed May 25, 1948. Edmund L. Smith,
Clerk. [52]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 54, inclusive, contain full, true and correct copies of Complaint for Injunction; Notice of Motion for Preliminary Injunction; Notice of Motion to Dismiss; Affidavit of Max L. Raskoff in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction; Counter-Affidavit of Harold F. Birnbaum in Support of Motion for Preliminary Injunction; Affidavit of William Felstiner in Support of Plaintiff's Motion for Preliminary Injunction; Minute Order Filed and Entered January 12, 1948; Plaintiff's Objection to Defendants' Proposed Findings of Fact and Conclusions of Law; Memorandum in Support of Finding and Conclusions Objected to by Plaintiff; Findings of Fact and Conclusions of Law on Motion for Preliminary Injunction; Order Denying Preliminary Injunction; Judgment of Dismissal; Notice of Appeal; Bond for Costs on Appeal; Stipulation and Order Extending Time to File Record and Docket Appeal; Notice of Substitution of Attorneys; Stipulation and Order for Transmission of Original Papers and Stipulation Designating Record on Appeal which, together with the original Affidavits of Raphael Bryant Malsin and Harold F. Birnbaum in Support of Motion for Preliminary Injunction and original Affidavit of Jack Lane, Jr. in Support of

Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction and Exhibits thereto, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.45 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26 day of May, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy.

[Endorsed]: No. 11940. United States Circuit Court of Appeals for the Ninth Circuit. Lane Bryant, Inc., Appellant, vs. Maternity Lane Ltd., of California, a corporation, Jack Lane, Jr., Jane Lane and Lucille Lane, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 27, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the Circuit Court of Appeals of the United States in
and for the Ninth Circuit

No. 11940

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE, LTD., et al.,

Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PART OF RECORD NECESSARY FOR CONSIDERATION THEREOF

Appellant Lane Bryant, Inc., intends to rely on appeal on the following points:

The District Court erred in denying plaintiff's (appellant's) motion for preliminary injunction.

The District Court erred in making a finding as to defendants' (appellees') lack of fraudulent intent (Finding IX) in connection with the denial of motion for preliminary injunction, appellant contending that such finding is immaterial and inappropriate.

The District Court erred in concluding that plaintiff (appellant) was guilty of laches, and in including Paragraph III as part of the Conclusions of Law in connection with denial of motion for preliminary injunction.

The District Court erred in granting defendants' (appellees') motion to dismiss the complaint and in giving and making the judgment of dismissal filed February 4, 1948.

* * * * *

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

Attorneys for Appellant

Receipt of copy of the foregoing Statement and Designation is admitted this 3rd day of June, 1948. H. Miles Raskoff, Attorney for Appellees.

[Endorsed]: Filed Jun. 3, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND REQUEST THAT CERTAIN
EXHIBITS BE CONSIDERED BY THE COURT
IN THEIR ORIGINAL FORM

It Is Hereby Stipulated and Agreed that in lieu of printing or otherwise reproducing the exhibits hereinafter mentioned, said exhibits be considered by the Court in their original form; the said exhibits so to be considered in their original form are the following:

1. All exhibits attached to affidavit of Raphael Bryant Malsin in support of preliminary injunction filed October 2, 1947.

2. All exhibits attached to affidavit of Harold F. Birnbaum in support of motion for preliminary injunction filed October 2, 1947.

3. All exhibits attached to affidavit of Jack Lane, Jr., in support of defendants' motion to dismiss and in opposition to plaintiff's motion for preliminary injunction filed October 17, 1947.

The Court is respectfully requested to dispense with the printing or other reproduction of the exhibits above mentioned because of the large number of photostats and photographs contained in such exhibits.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

Attorneys for Appellant

H. MILES RASKOFF

Attorney for Appellees

So Ordered:

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Jun. 3, 1948. Paul P. O'Brien,
Clerk.

No. 11940

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

OPENING BRIEF FOR APPELLANT.

HAROLD A. BLACK,
PHILIP K. VERLEGER,
MCCUTCHEEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE,

704 Roosevelt Building, Los Angeles 14,

Attorneys for Appellant.

JUL 23 1948

TOPICAL INDEX

	PAGE
Statement as to jurisdiction.....	1
Statement of the case.....	2
Prefatory statement	2
Detailed statement	3
Summary of argument and specifications of error.....	7
Argument	9

I.

The complaint states a cause of action for unfair competition and the motion for dismissal must be decided upon the complaint alone	9
A. The motion to dismiss for failure to state a claim goes solely to the sufficiency of the complaint.....	9
B. Adoption of a name similar in part, and of similar advertising methods, for the purpose of passing one's goods as those of another, is actionable.....	11
C. Appellees cannot be heard to contend that their fraud will necessarily be unsuccessful.....	22
D. The complaint states a cause of action: Under its terms appellant could prove that appellees' acts were reasonably likely to cause deception of the public, even if not fraud.....	25
E. The fact that appellee's names are "Lane" does not aid them	28

II.

Appellant stated a cause of action for trade-mark infringement	30
----------------------------------------------------------------	----

III.

The trial court erred in denying a preliminary injunction.	
The trial court erred in its finding with respect to the preliminary injunction	37
Conclusion	39

TABLE OF AUTHORITIES CITED

CASES	PAGE
Academy of Motion Pictures etc. v. Benson, 15 Cal. (2d) 685, 104 P. (2d) 650.....	18, 26
Abel v. Munro, 110 F. (2d) 647.....	10
Alston v. School Board of Norfolk, 112 F. (2d) 992.....	10
American Automobile Association v. American Automobile Owners Association, 216 Cal. 125, 13 P. (2d) 707.....	20
American Lead Pencil Co. v. Gottlieb, 181 Fed. 178.....	34
Avrick v. Rockmont Envelope Co., 155 F. (2d) 568.....	35
Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704.....	16
Barnes v. Cahill, 56 Cal. App. (2d) 780, 143 P. (2d) 433.....	18
Brooks Bros. v. Brooks Clothing of California, 60 Fed. Supp. 442; aff'd 158 F. (2d) 798.....	30
Carolina Pines, Inc. v. Catalina Pines, 128 Cal. App. 84, 16 P. (2d) 781	18
Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. 97.....	17
City of Covington v. Cincinnati N. & C. Co., 71 F. (2d) 117....	37
Coca-Cola Co. v. Nehi Corporation, 36 A. (2d) 156.....	27
Colgate v. Adams, 88 Fed. 899.....	34
Dodge Stationery Company v. Dodge, 145 Cal. 380, 78 Pac. 879	25
Dunston v. Los Angeles Van etc. Co., 165 Cal. 89, 131 Pac. 115	20
Eastern Columbia, Inc. v. Waldman, 30 Cal. (2d) 268, 181 P. (2d) 865	17
Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.....	12
Excelsior C. M. Co. v. Taylor Milling Co., 43 Cal. App. 591, 186 Pac. 207	21
Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014.....	19

Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 28 S. Ct. 350, 52 L. Ed. 616.....	27, 30
Hoover Co. v. Groger, 12 Cal. App. (2d) 417, 55 P. (2d) 529....	18
Hoyt Heater Co. v. Hoyt, 68 Cal. App. (2d) 523, 157 P. (2d) 657	19, 29
Italian-Swiss Colony v. I. Vineyard Co., 158 Cal. 252, 110 Pac. 913	14
Jackman v. Mau, 78 Cal. App. (2d) 234, 177 P. (2d) 599.....	29
L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 S. Ct. 91, 59 L. Ed. 139.....	30
Land v. Dollar, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. (Adv. Ops.) 903	10
Modesto Creamery v. Stanislaus etc. Co., 168 Cal. 289, 142 Pac. 845	14
Morton v. Morton, 148 Cal. 142, 82 Pac. 664.....	21
My-T Fine Corporation v. Samuels, 69 F. (2d) 76.....	23
National Biscuit Co. v. Swick, 121 Fed. 1007.....	34
O. & W. Thum Co. v. Dickinson, 245 Fed. 609.....	24
Pecheur Lozenge Co., Inc. v. National Candy Co., Inc., 315 U. S. 666, 62 S. Ct. 853, 86 L. Ed. 1103.....	12
Physicians Electric etc. Corp. v. Adams, 79 Cal. App. (2d) 550, 180 P. (2d) 422.....	19
Photoplay Pub. Co. v. La Verne Pub. Co., 269 Fed. 730.....	24
Pohl v. Anderson, 13 Cal. App. (2d) 241, 56 P. (2d) 992.....	21
Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6.....	10
S. S. Kresge Co. v. Winget Kickernick Co., 96 F. (2d) 978.....	32
Securities and Exchange Commission v. Sunbeam Gold M. Co., 95 F. (2d) 699.....	37
Simmons v. Peavy-Walsh Lbr. Co., 113 F. (2d) 812.....	9
Slazenger & Sons v. Feltham & Co., 6 R. P. C. 531.....	24

Trimble v. Woodstock Mfg. Co., 297 Fed. 524; aff'd 297 Fed. 529	34
Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142....	13, 17
William Waltke & Co. v. Geo. H. Schafer & Co., 263 Fed. 650....	34

STATUTES

Federal Rules of Civil Procedure, Rule 56.....	35
Judicial Code, Sec. 24 (28 U. S. C. A., Sec. 41(1)).....	2
Judicial Code, Sec. 128 (28 U. S. C. A., Sec. 225).....	2
Lantham Act (15 U. S. C. A., Sec. 1114(1)).....	31

TEXTBOOKS

2 Nims, Unfair Competition and Trade-Marks (4th Ed.), p. 706	35
2 Nims, Unfair Competition (4th Ed.), pp. 706-713.....	34
2 Nims, Unfair Competition (4th Ed.), Sec. 320, pp. 1019-21....	32
Restatement of the Law of Torts, Sec. 717.....	31

No. 11940
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

OPENING BRIEF FOR APPELLANT.

This appeal is from a final judgment of the District Court for the Southern District of California, Central Division, the Hon. Peirson M. Hall, Judge presiding. The judgment dismissed, for failure to state a claim, appellant's complaint seeking an injunction against trademark infringement and unfair competition [Tr. 50]. This appeal is also taken against the order of the Court denying appellant a preliminary injunction [Tr. 49].

Statement as to Jurisdiction.

Appellant Lane Bryant, Inc., is a corporation organized and existing under the laws of the State of Delaware [Tr. 2]. Appellee Maternity Lane Ltd. of California is a corporation organized under the laws of the State of California [Tr. 2]. The individual appellees are citizens of California [Tr. 2]. The matter in controversy exceeds

\$3,000 [Tr. 3, 4, 5]. These facts, appearing in the complaint, gave the District Court jurisdiction under section 24 of the Judicial Code (28 U. S. C. A., sec. 41(1)).

The jurisdiction of this Court to review the said decree rests upon section 128 of the Judicial Code (28 U. S. C. A., sec. 225) and notice of appeal duly filed [Tr. 51].

Statement of the Case.

PREFATORY STATEMENT.

Summarily stated, the complaint alleges:

Appellant, Lane Bryant, Inc., and its predecessors in interest, have done a large business by mail order and retail stores, specializing in maternity clothes, since 1900 [Tr. 3, 4]. In excess of \$40,000,000 have been expended by appellant in advertising its business under the name "*Lane Bryant*," and for mail order catalogues under the name "*Lane Bryant*." As a result, the words "*Lane Bryant*," in conjunction with "Maternity" and "Mothers-to-be" or similar words, refer in the public's mind to appellant [Tr. 5].

Since March 1946 appellees have done business under the name "*Maternity Lane, Ltd.*" by retail and mail order, printing that name in a script resembling that used by appellant, and using similar advertising expressions. Appellees' object is to pass themselves off as being connected with appellant and to cause the public to believe that appellant's goods can be bought from appellees.

Injunctive relief is sought against this conduct.

This complaint was dismissed for failure to state a claim upon which relief might be granted.

A motion for preliminary injunction was filed by appellant [Tr. 9], and affidavits in support and in opposition

thereto [Tr. 10 through 32]. It was denied: in view of the dismissal, it could not, of course, have been granted.

Our basic contentions are:

- (a) This complaint states a cause of action, and
- (b) The preliminary injunction should have been granted.

DETAILED STATEMENT.

Appellant by its complaint filed October 2, 1947, alleges, *first*, as to its own history and activities [Tr. 2 through 5 inclusive]:

Appellant Lane Bryant, Inc., succeeded in 1920 to the business, goodwill and trade-marks of a New York Corporation of the same name, which in turn had in 1916 acquired the business, goodwill and trade-marks of an enterprise established by Lane Bryant, an individual, in 1900. From its inception this business specialized in maternity apparel, and apparel for stout women. For many years it had been extensive, in retail stores and departments, and, in addition, an extensive mail order business in the United States and Canada has been done under the name "*Lane Bryant*." Appellant operates seven stores directly or through wholly owned subsidiaries under the name *Lane Bryant* in New York, Brooklyn, Chicago, Philadelphia, St. Louis, Des Moines and Baltimore. In addition, wholly owned subsidiaries of appellant operate stores in which there are Lane Bryant departments in Cleveland, Ohio; St. Paul, Minn.; Oshkosh, Wis.; Green Bay, Wis.; Davenport, Ia.; Des Moines, Ia.; South Bend, Ind.; Springfield, Kankakee, Rockford, Waukegan and Decatur, Ill.

Commencing in 1911 "*Lane Bryant*" was used in this business as a common law trade-mark. Application for

registration thereof was filed in the United States Patent Office on October 20, 1927, and issued as Trade-mark No. 238911 in 1928.

Since 1916 appellant and its predecessors have expended approximately \$33,000,000 in advertising its retail and mail order business under this name and in advertising its trade-mark "*Lane Bryant*" in newspapers and magazines throughout the United States. In addition, appellant and its predecessors have expended approximately \$10,000,000 over the same period of years in connection with its mail order catalogues. From the year 1938 through the spring of 1947 more than 50,000 of said mail order catalogues were mailed to customers of appellant in California.

In its advertising of maternity apparel appellant has stressed the word "Maternity," the phrase "Mothers-to-be" or the phrase "Mother-to-be," and has used this language continuously in association with appellant's corporate name and trade-mark. Appellant has become permanently identified in the public mind as a specialist in maternity apparel, and the name "*Lane Bryant*," the word "Maternity" and the phrase "Mother-to-be," when used in conjunction with "*Lane Bryant*," or a similar name, have acquired a secondary meaning throughout the United States whereby the combination is referred to and understood to mean the appellant. Appellant has acquired a high reputation in its field and a goodwill worth greatly in excess of \$1,000,000.

It is alleged, *second*, as to appellees' acts that [Tr. 6 through 8]:

In March 1946 appellees Maternity Lane Ltd. of California established and thereafter operated a retail store for the sale of maternity apparel. This store is located

on the ground floor of 3837 Wilshire Boulevard, Los Angeles, California. The store maintains a large neon sign and also a sign in its window containing the words "Maternity Lane" written in a script closely resembling appellant's trade-mark and corporate name. Shortly thereafter appellees commenced to solicit mail order business for such apparel throughout the United States by means of an advertising program in nationally circulated magazines, as well as in Los Angeles papers.

By adopting and exploiting the name "*Maternity Lane*" appellees are endeavoring to pass themselves off as being connected with appellant, and to cause the public to believe that maternity apparel sold by appellant can be purchased at the retail store of appellees or by mail order from them. They have copied and repeatedly used the phrase "Mother-to-be," and on at least one occasion copied the phrase in the identical script used by appellant. Appellees' intent was to appropriate the appellant's goodwill by simulating its corporate name and trade-mark and by imitating appellant's distinctive advertising and slogans for the purpose of thereby unlawfully diverting appellant's customers and business to appellees.

Appellant has protested to appellees against the use by them of the name "*Maternity Lane Ltd.*" and the simulation of appellant's corporate name and trade-mark. Appellees refused to discontinue the use thereof, and thereafter intensified their simulation of appellant's corporate name and trade-mark.

The foregoing are the allegations of appellant's complaint upon which an injunction was sought.

The following is the situation with respect to the application for a preliminary injunction:

Together with the complaint appellant filed an affidavit [Tr. 10] and a notice of motion for preliminary injunction [Tr. 9]. The affidavit set forth the same material alleged in the complaint in greater detail, with numerous Exhibits relating to instances of the alleged infringement of trade-mark and unfair competition. The affidavit was, of course, filed solely in support of the application for preliminary injunction. On October 17, 1947, appellees filed a notice of motion to dismiss for failure to state a claim upon which relief could be granted [Tr. 22]. Various affidavits were filed on behalf of appellees generally tending to controvert appellant's allegations [Tr. 23 *et seq.*]. Certain supplemental affidavits were filed on behalf of appellant [Tr. 31]. All of appellant's affidavits were entitled "Affidavits in Support of the Motion for Preliminary Injunction" [Tr. 10, 21, 31, 33], and were not filed with respect to the motion to dismiss. Appellees' affidavits purported to be filed both in opposition to the motion for preliminary injunction and in support of the motion to dismiss.

The Court's action was in all respects adverse to appellant. The motion to dismiss was granted and the preliminary injunction denied. A brief memorandum opinion was filed. Findings were made with respect to the denial of the preliminary injunction.

It appears to us that the following questions arise:

1. Does the complaint state a cause of action for unfair competition?
2. Does the complaint state a cause of action for infringement of trade-mark?
3. Did the District Court err in denying appellant's motion for preliminary injunction?

Summary of Argument and Specifications of Error.

We contend that the trial court erred in dismissing the complaint in that:

1. In deciding the motion to dismiss, which went only to the sufficiency of the complaint, the Court considered, in addition to the complaint, the various affidavits on file. The affidavits were properly before the Court only on the question whether a preliminary injunction should be granted. Appellant did not submit the cause to a trial on affidavits.

2. The complaint stated a claim upon which relief might be granted, for the following reasons:

(a) The complaint alleged an intentional effort to pass off appellees' goods as those of appellant. Under the law of California, which governs, such conduct is unfair competition.

(b) Under the allegations of the complaint, appellant could prove that appellees' conduct was reasonably apt to cause confusion in the mind of the public between appellant and appellees. Under the law of California, such conduct is unfair competition.

(c) Under the complaint appellant could prove an infringement of appellant's trade-mark. The question of infringement cannot be determined by a mere comparison of the names, on the pleadings: the question of infringement is one of fact, to be determined on the trial by the evidence as to danger of, or actuality of confusion.

(d) The fact that the individual appellees' names are "*Lane*" does not prevent relief, where fraud is alleged, or actual danger of confusion may appear from the proofs; moreover, appellees have not used their own name as such, but rather have used it in an artificial sense.

3. The trial court erred in denying the preliminary injunction:

The trial court was compelled to deny the preliminary injunction by its decision to dismiss the case, and therefore was precluded from exercising its proper discretion on this score. Hence this order should also be reversed.

ARGUMENT.

I.

The Complaint States a Cause of Action for Unfair Competition and the Motion for Dismissal Must Be Decided Upon the Complaint Alone.

A.

The Motion to Dismiss for Failure to State a Claim Goes Solely to the Sufficiency of the Complaint.

The trial court appears to have assumed that on motion to dismiss it was free to consider the case as submitted for decision upon the complaint and the affidavits filed by all parties. In its Minute Order it stated [Tr. 34]:

“From the complaint and *affidavits on file*, I cannot see the slightest possibility of a misleading or deceptive statement, insofar as the plaintiff’s name or business is concerned, in either the name of the defendants, or the use by the defendants in their business of the words ‘maternity,’ ‘mother,’ ‘mother-to-be,’ ‘motherhood,’ or the picture of a ‘stork,’ or the picture of a clothed pregnant woman. Both the words and the ideas back of them have been so long in the public domain, as well as the use of special clothing during pregnancy, as to preclude relief under the plaintiff’s complaint, or the motion for temporary restraining order and the affidavits filed. Nor does the use of the word ‘Lane’ by the defendant indicate any basis for relief under plaintiff’s complaint *and affidavits.*” (Italics added.)

But a motion to dismiss does not submit a case for decision on affidavits. A motion to dismiss admits all facts alleged in the complaint (*Simmons v. Peavy-Walsh Lbr. Co.* (C. C. A. 5), 113 F. (2d) 812). The allega-

tions of the complaint, though denied, must be taken as true (*Alston v. School Board of Norfolk* (C. C. A. 4), 112 F. (2d) 992). The pleading must be construed in the light most favorable to the appellant (*Abel v. Munro* (C. C. A. 2), 110 F. (2d) 647). And affidavits, such as were before the court in the present case, may not be considered on such a motion.

In *Land v. Dollar*, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. Adv. Op. 903, the Supreme Court stated (per Douglas, J.):

“In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered.” (Note 4, 330 U. S. at 735, 67 S. Ct. at 1011.)

In *Polk Co. v. Glover*, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6, the Supreme Court stated:

“We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. *Defendants’ motion to dismiss, like the demurrer for which it is a substitute* (Equity Rule 29, 28 U. S. C. A. following section 723) *was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the*

application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.” (305 U. S. at 9, 59 S. Ct. at 17.) (Italics added.)

The judgment was reversed.

In each of those cases, there was an application on plaintiff's part for a preliminary injunction, supported by affidavits, and opposed by defendant's affidavits. In each case there was also a motion to dismiss, and the trial court considered the affidavits, as in our case, instead of confining itself to the complaint, in determining the motion, as the Supreme Court held that it must. In each case this error was held to require a reversal.

B.

Adoption of a Name Similar in Part, and of Similar Advertising Methods, for the Purpose of Passing One's Goods as Those of Another, Is Actionable.

The complaint alleges a fraudulent attempt by appellees to appropriate appellant's business. It states in paragraph XIV:

“By the adoption and exploitation of the corporate name ‘Maternity Lane Ltd. of California,’ which the defendants frequently shorten to ‘Maternity Lane Ltd.,’ defendants in the conduct of their business are endeavoring to pass themselves off as being connected with plaintiff in a manner and with the intent to deceive the public, and to cause the public to believe that maternity apparel sold by plaintiff can be purchased at the retail store of said defendant or by mail order from it. As an illustration of defendants' conduct, they have copied and repeatedly used the phrase ‘Mother-to-be’ and in at least one instance,

which has come to plaintiff's attention, an advertisement of the corporate defendant copied said phrase in the identical script which plaintiff had developed and adopted therefor."

It states in paragraph XVI:

"The acts of defendants which are complained of herein were done in violation of plaintiff's exclusive right to its trade-mark 'Lane Bryant' used in connection with plaintiff's sale of maternity apparel, and with a fraudulent and unlawful intent and design to appropriate the plaintiff's good will by simulating its corporate name and trade-mark and by imitating plaintiff's distinctive advertising and slogans, all for the purpose of thereby unlawfully diverting plaintiff's customers and business to the corporate defendant."

It states in paragraph XVII:

"Unless defendants are immediately restrained in accordance with the prayer of this complaint, plaintiff will be irreparably damaged and the public will be deceived and defrauded as hereinabove alleged."

Summarily, the complaint alleges an intentional effort, through the use of the name "*Maternity Lane*," and through use of similar advertising methods, to pass off appellees' goods as those of appellant. Unless enjoined, it is alleged, the public will be so deceived. Since the decisions in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and *Pecheur Lozenge Co., Inc. v. National Candy Co., Inc.*, 315 U. S. 666, 62 S. Ct. 853, 86 L. Ed. 1103, questions of unfair competition must be determined by applicable state law.

The decisions in California are explicit that appellees' conduct constitutes unfair competition and is actionable.

In the leading case of *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 145, defendant adopted a name similar to that of his competitor, and designed the front of his store so as to resemble the store of his competitor. The Court stated the law as follows (pp. 539-540):

“The fundamental principle underlying this entire branch of the law is, that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trademarks, declares the wrong to be, ‘Not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude. The wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry, an injustice that is in direct transgression of the Decalogue, “Thou shalt not covet . . . anything that is thy neighbor’s.”’ The most detestable kind of fraud underlies the filching of another’s good name in connection with trafficking.’ *We think the principle may be broadly stated, that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman. thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed—a fraud which a court of equity will not allow to thrive.*” (Italics added.)

This case has been cited and followed by the California Supreme Court and the District Court of Appeal on numerous occasions since the date of its decision. The principle stated therein is that “when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman . . . a fraud is

committed—a fraud which a court of equity will not allow to thrive.” That is exactly the fraud in which, according to the complaint, appellees are now engaged.

The same principle is stated more compactly in the later case of *Italian Swiss Colony v. I. Vineyard Co.*, 158 Cal. 252, 110 Pac. 913, 914. The Court there said (pp. 255-256):

“That the law will afford protection against the ‘unfair competition’ of one who seeks, by imitation of label or package or by other artifice, to induce persons to deal with him in the belief that they are dealing with another, is, of course, well settled. (Citations.) All of these cases rest upon the basis of fraud. There must be the intent to deceive, or at least, the doing of things reasonably likely to deceive.”

In the present case the Court apparently assumed that because the language characteristically used in appellees’ advertising was “in the public domain,” no action would lie, though the complaint alleged that language was used to lead the public to believe that appellees were handling appellant’s goods. In California at least this is not the law.

In *Modesto Creamery v. Stanislaus Etc. Co.*, 168 Cal. 289, 142 Pac. 845, the plaintiff had used the word “*Modesto*” as a label for its butter. Modesto is, of course, a town in central California, and the Court recognized that the plaintiff could have no exclusive right to the use of the word “*Modesto*.” It was nevertheless held that the defendant could be enjoined from using that word in

such a manner as to deceive the public into purchasing the defendant's product as that of plaintiff. In this behalf, the court stated (at pp. 292-293, 142 Pac. 846):

“The relief granted by the decree does not rest upon any ownership by plaintiff of the exclusive right to the use of the word “Modesto” as a trademark. A ‘designation . . . which relates only to the . . . place where the thing is produced’ cannot be appropriated as a trademark. (Civ. Code, sec. 991.) The suit is one to restrain unfair competition. The principles involved have been declared in numerous decisions, not a few of which have been rendered by this court. In *Banzhaf v. Chase*, 150 Cal. 180, (88 Pac. 704), they are stated in the following language which, with the substitution of the word ‘butter’ for ‘bread’ (the article which occasioned the controversy in the Banzhaf case) is entirely appropriate to the case at bar. ‘The case of the plaintiffs . . . is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiffs and benefit himself, simulates the plaintiff’s goods, deceives the plaintiff’s patrons into the belief that his bread is that made by the plaintiffs and thereby induces them to buy his own bread instead of the plaintiffs’, thus, by fraud and deception, depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trademark. . . . The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trademarks or of the ownership of

such trademark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trademark, but the fraudulent injury to and appropriation of another's trade.' ”

In that case the Court relied heavily on *Banzhaf v. Chase*, 150 Cal. 180, 88 Pac. 704. In *Banzhaf v. Chase*, the plaintiff had been for many years selling a bread known as “Old Homestead” bread. The defendant was enjoined from selling another bread under the name of “New Homestead.” The Court recognized that the words “Old Homestead” might be taken to be merely descriptive of the type of bread sold. It stated (at p. 182, 88 Pac. 705):

“The words ‘Old Homestead,’ or ‘Homestead,’ may, and perhaps do, suggest that the bread on which they appear is asserted to be similar to that made in the ordinary old homestead. . . . But we may concede that the words are descriptive in character and relate to quality, and hence that, under section 991 of the Civil Code, they cannot be appropriated by any person as his own, so as to give him a right to prevent their use by another to his injury, regardless of the motives or purposes of the other in so using them.”

It then went on to say (p. 183):

“The case of the plaintiffs does not depend on their right to the exclusive use of the words in question. It is based on fraud.”

It continued with the language quoted by the Court in the preceding case, and granted the injunction desired.

Thus, under the law of California, where there is a fraudulent attempt to induce the public to believe that it

is buying the goods of one person from another, that attempt will be enjoined. It makes no difference whether or not the words copied are words "in the public domain."

The intrusion of such a question, indeed suggests that the trial court confused the law of unfair competition, with the law of trademarks, for the doctrine of unfair competition is largely concerned with, and grew out of cases where the exclusive appropriation of words, as trademarks, was not possible or not involved.

It is true, of course, that appellant's name and appellees' name are identical only in part. Partial identity is quite sufficient, however, to cause confusion of customers. "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another." (Bradley, J., in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 97 (Circuit Court, D. New Jersey), quoted in *Weinstock, Lubin & Co. v. Marks*, *supra*, 109 Cal. at 537, 42 Pac. at 144.) As varying degrees of similarity may be the means of fraud, so they are equally subject to the power of a court of equity. "Equity will not concern itself about the means by which fraud is done. It is the result arising from the means—it is the fraud itself—with which it deals." (*Ibid.*, 109 Cal. at 541, 42 Pac. at 146.)

The question is not—how much do the names resemble each other; it is rather, is such resemblance as does exist the means of deception? Close resemblances have been held to establish no cause of action: relatively distant and slight resemblances have afforded relief, all depending on the proof.

Thus, in *Eastern Columbia, Inc. v. Waldman*, 30 Cal. (2d) 268, 181 P. (2d) 865, the use of the name "*Western*

Columbia” was enjoined upon application of “*Eastern Columbia, Inc.*”

In *Academy of Motion Pictures etc. v. Benson*, 15 Cal. (2d) 685, 104 P. (2d) 650, the plaintiff, *Academy of Motion Picture Arts and Sciences*, was granted an injunction against the use by the defendant of the name “*The Hollywood Motion Picture Academy.*” In that case the businesses of the plaintiff and defendant were totally dissimilar, so that the similarity of advertising material, which, in addition to similarity of names, is charged in our case, could not exist.

In *Carolina Pines, Inc. v. Catalina Pines*, 128 Cal. App. 84, 16 P. (2d) 781, an injunction was granted to the restaurant, *Carolina Pines, Inc.*, against the use by defendant of “*Catalina Pines.*”

In *Hoover Co. v. Groger*, 12 Cal. App. (2d) 417, 55 P. (2d) 529, the plaintiff, doing business under the names, “*The Hoover Company*” and “*Hoover Suction Sweeper Company,*” was granted an injunction against the use by defendant of the name “*Hoover Vacuum Cleaner Repairing.*”

In *Barnes v. Cahill*, 56 Cal. App. (2d) 780, 143 P. (2d) 433, the plaintiff sold weekly newspaper matrices under the name “*Hollywood Today.*” The trial court found that use by defendant of the title “*This Week in Hollywood*” did not tend to mislead the plaintiff’s customers. The Court, while stating that it need not determine the correctness of this decision, because reversing for other reasons, stated, “At least a finding the other way would have been well supported.” The resemblance between “*Maternity Lane*” and “*Lane Bryant,*” where both firms are in the “*maternity*” business is at least as great

as that between "*Hollywood Today*" and "*This Week in Hollywood*." Under the decision of the District Court of Appeal, deception as between those names was a question of fact. We have not been allowed, because of the decision of the case upon motion to dismiss, to present our evidence upon this question of fact.

In *Hoyt Heater Co. v. Hoyt*, 68 Cal. App. (2d) 523, 157 P. (2d) 657, it was held that defendant was guilty of unfair competition with plaintiff, where plaintiff used the trade names "*Hoyt Heater Company*" and "*Hoyt Automatic Water Heater Company*," and the defendant used the names "*Hoyt C. H. Co.*," "*Hoyt C. H. Automatic Water Heater Repair Service and Supply Co.*," "*A. A. Automatic Hoyt A-1 Water Heating Co.*" and "*Automatic Hoyt Hot Water Heater Repair Service Co.*" The defendant was enjoined from using the name "*Hoyt*" in a business competing with that of plaintiff, either alone or in combination with other words.

In *Physicians Electric Etc. Corp. v. Adams*, 79 Cal. App. (2d) 550, 180 P. (2d) 422, an injunction was granted in favor of *Physician's Electric Service Corp.* against the use by defendant of the name "*Physician's Electronic Service*."

In *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014, an injunction was granted in favor of plaintiff, who did business under the name of "*Cyclops Machine Works*" against the use by defendant of the name "*Cyclops Iron Works*."

Any remaining doubt that the issue is not determined by a mere inspection of the names, without the benefit of proof as to the manner in which those names were used, should be eliminated by the cases in which injunctions were not granted.

In *Dunston v. Los Angeles Van Etc. Co.*, 165 Cal. 89, 131 Pac. 115, the plaintiff did business under the name of *Los Angeles Van, Truck & Storage Company*. The defendant thereafter went into business under the name "*Los Angeles Van & Storage Company*." Those names, it will be observed, are far closer than the names in many of the cases cited above in which injunctions were granted. The court, however, pointed out that in the cases where relief was granted, such relief rested upon the pleading and proof of fraud. It stated (at pp. 94-95) 131 Pac. 117:

" . . . But, as has been intimated, relief in such cases really rests upon the deceit or fraud which the later comer into the business field is practicing upon the earlier comer and upon the public. Like all other kinds of fraud and deceit this is not presumed but must be pleaded and shown. Since plaintiff had no exclusive property right by way of trademark in the use of the name, it follows that the mere similarity of names does not establish the fraud. It must be such a misuse of the name by advertising and soliciting as amounts to fraud, and without this proof no relief may be granted. . . . "

If total similarity, in the absence of fraud, did not allow relief, how can partial dissimilarity, in the presence of fraud, preclude relief? Appellant has pleaded, and asks that it be allowed to prove, the fraud which was absent in the *Dunston* case.

Similarly, in *American Automobile Association v. American Automobile Owners Association*, 216 Cal. 125, 13 P. (2d) 707, an injunction was denied where fraud was not proved, despite the very close similarity in the names.

In *Pohl v. Anderson*, 13 Cal. App. (2d) 241, 56 P. (2d) 992, on the basis of a finding that there was no fraud, the plaintiff, operator of a "*Giant Orange*" dispensing booth, was denied an injunction against the use by defendant of "*Jumbo Lemon*," the booth being so labeled, although the defendant had a connected booth in the form of a large orange also. A like conclusion was reached on the same basis in *Excelsior C. M. Co. v. Taylor Milling Co.*, 43 Cal. App. 591, 186 Pac. 207.

As was said in *Morton v. Morton*, 148 Cal. 142, 144, 145, 82 Pac. 664, 665:

" . . . As in *Weinstock v. Marks*, 109 Cal. 529 (42 Pac. 142, 50 Am. St. Rep. 57), and *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, (78 Pac. 879), the basis of plaintiffs' action is that defendant is attempting by fraudulent representations to the effect that defendant's business is plaintiffs' business to appropriate the benefit of the good-will of plaintiffs' established business."

And at page 146 (82 Pac. 666):

" . . . It is well settled that while a person undoubtedly has the right to engage in business in his own name he will not be allowed to resort to any artifice or contrivance in the use of that name for the purpose of deceiving the public as to the identity of his business or products, and that to prevent this result a certain manner of use of one's own name may in a proper case be prohibited."

The issue is not, how much or how little does appellees' name resemble that of appellant: the issue is, have appellees, by use of the name "*Lane*," sometimes in script lettering, in conjunction with the phrase, "Mothers-to-be,"

by coupling these together with "Maternity," attempted to deceive appellant's customers? These words, when used in combination, it is pleaded, are intimately associated with appellant [Tr. 5]. Appellant has pleaded deception is appellees' intent, and should be allowed its day in court to prove this allegation.

C.

Appellees Cannot Be Heard to Contend That Their Fraud Will Necessarily Be Unsuccessful.

The motion to dismiss, as we have seen, admits the allegations of the complaint. Appellees' position therefore must be that, although appellees have adopted the name "*Maternity Lane, Ltd.*," used a script similar to appellant's, and used advertising similar to appellant's, with the intention of passing their goods off as appellant's, no action will lie. The only conceivable argument in favor of this position is that, although appellees' intentions were fraudulent, appellees' methods were so inept that they could not possibly succeed. Under the California authorities cited above, we doubt that this defense is sufficient. With the name used by appellees *identical* in part with that of appellant, it is idle to suggest that the names have no resemblance to each other. We have found no California case holding that a deliberate and fraudulent use of a name similar to that of another, for the purpose of passing off one's goods as those of a competitor, will not be enjoined because a court may feel that it will fail. The cases cited above appear to the contrary, and the language we have already quoted would indicate that the courts will enjoin such a fraudulent attempt, without making nice inquiries into the probabilities of its success. It is not necessary, however, for the purpose of this appeal to

determine whether or not our understanding of these cases is correct, for it is perfectly clear that the courts will presume the probability of success from the attempted fraud, and that the appellees would be required strictly to prove the impossibility of their own success.

In *My-T Fine Corporation v. Samuels* (C. C. A. 2), 69 F. (2d) 76, at 77, it is stated by Judge Learned Hand that:

“ . . . We need not say whether that intent is always a necessary element in such causes of suit; probably it originally was in federal courts. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997; *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 S. Ct. 270, 45 L. Ed. 365. But when it appears, we think that it has an important procedural result; a late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile. *Prima facie* the court will treat his opinion so disclosed as expert and will not assume that it was erroneous. *Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 F. 869, 877 (C. C. A. 2); *Capewell Horse Nail Co. v. Green*, 188 F. 20, 24 (C. C. A. 2); *Wolf Bros. & Co. v. Hamilton*, 165 F. 413, 416 (C. C. A. 8); *Thum Co. v. Dickinson*, 245 F. 609, 621, 622 (C. C. A. 6); *Wesson v. Galef* (D. C.), 286 F. 621, 626. He may indeed succeed in showing that it was; that, however bad his purpose, it will fail in execution; if he does, he will win. *Kann v. Diamond Steel Co.*, 89 F. 706, 713 (C. C. A. 8). But such an intent raises a presumption that customers will be deceived.”

Again, in *Photoplay Pub. Co. v. La Verne Pub. Co.* (C. C. A. 3), 269 Fed. 730, it is stated at page 733:

“ . . . The question is: What is the commercial effort of what he is doing? If the effect is to pass off his goods for those of the complainant, his good intentions or honesty of purpose is not a defense. Intention, however, is not immaterial, for it would be difficult, though not impossible, for a defendant to satisfy the court that his fraudulent conduct would not have the effect that it was intended to have.”

To assume, from a casual examination of the names, that they do not look to be the same and therefore that the fraud intended will not be accomplished, “ . . . ascribes to the originator of the scheme a lack of resource that is not deserved” (see *O. & W. Thum Co. v. Dickinson* (C. C. A. 6), 245 Fed. 609, 621); purposeful deception is hardly entitled to any such special favor.

As was said by Lindley, L. J., in *Slazenger & Sons v. Feltham & Co.*, 6 R. P. C. 531, at 538:

“ . . . One must exercise one's common sense, and, if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success or possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?”

We have perhaps belabored this point intensively enough. The Court's memorandum opinion shows that it felt that the motion to dismiss submitted the case to it upon the affidavits as well as the complaint; were it not for this error, we do not think it reasonable to suppose

that there is any likelihood that the motion to dismiss would have been sustained. The decisions of the Supreme Court, which we have cited, show clearly enough that this understanding was incorrect. The sole question in this behalf before the court is, "Does the adoption of a name identical in part, dissimilar in part, and the use of similar advertising methods, with the purpose of causing confusion of goods and deception to the public, allow an injunction?" There can be no reasonable doubt as to the answer to this question.

D.

The Complaint States a Cause of Action: Under Its Terms Appellant Could Prove That Appellees' Acts Were Reasonably Likely to Cause Deception of the Public, Even If Not Fraud.

Under the law of California, as we have seen, appellant has the right to an injunction against the attempt, on appellees' part, to cause the public to believe that appellant's goods could be purchased at appellees' shop, and by mail order from appellees. But appellant's right to recover for fraud is not his only right, for if appellees' conduct is reasonably likely to confuse the public, appellant has the right to have that conduct enjoined, even if appellant cannot prove specific fraudulent intent.

In *Dodge Stationery Company v. Dodge*, 145 Cal. 380, 390, 78 Pac. 879, 883, the plaintiff, *Dodge Stationery Company*, obtained an injunction against the use by defendant of the name "*J. S. Dodge Company*." There was a contention made on the part of the defendant that there

was no actual fraudulent intent. The court, however, rejected this contention, making the following statement:

“It appears also to be immaterial in this connection whether or not such term, ‘Dodge,’ was used on the signs with actual fraudulent intent. If the natural and necessary consequence of said defendant’s conduct in this respect was such as to cause deception, said defendant, knowing the facts, must be held to the same responsibility even if it acted under the honest impression that no right of the plaintiff was invaded.”

And, in *Academy of Motion Pictures etc. v. Benson*, 15 Cal. (2d) 685, 691, 104 P. (2d) 650, 653, the court made the following statement (at 691):

“ . . . The defendant has adopted a name which *prima facie* is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff. The plaintiff has stated a cause of action which, if supported by proof, would entitle it to the relief sought, or which would require the defendant to alter her trade name by some designation calling attention to the limited scope of her school in order to prevent confusion with the institution or society represented by the plaintiff—as stated by Justice Holmes in *Herring-Hall-Marvin Safe Co. v. Hall’s Safe Co.*, 208 U. S. 554, 559 (28 Sup. Ct. 350, 52 L. Ed. 616), ‘so as to give the antidote with the bane’.” (Italics added.)

It will be observed that the standard employed is whether “an ordinary unsuspecting person” would be confused. If, therefore, the public is reasonably likely to assume any connection between the appellant and the appel-

lees, the appellant will have its remedy. If the public, casual as it inevitably is with names, will assume that because of the similarity of the names, appellees are selling appellant's goods, appellant should have its remedy.

One entering an already occupied field must take care to avoid unnecessary adoption or imitation of a confusing name, label, or dress of goods.

Herring-Hall-Marvin Safe Co., v. Hall's Safe Co.,
208 U. S. 554, 28 S. Ct. 350, 352, 52 L. Ed.
616;

Coca-Cola Co. v. Nehi Corporation, (Del.) 36 A.
(2d) 156.

Such danger of confusion exists here if the plainly pleaded facts are true. Appellant has specialized since 1900 in maternity clothes. It conducts an extensive mail order business throughout the United States. It maintains subsidiary stores in numerous cities through the east and middle-west United States. It has expended upwards of \$33,000,000 for advertising, and upwards of \$10,000,000 for advertising catalogues, more than 50,000 of which have been mailed in the past 10 years into California.

In advertising appellant has, necessarily, heavily stressed the word "Maternity," and constantly used the phrase "Mothers-to-be" in addressing its customers. Thus the words "Maternity" and "Mothers-to-be" are associated in the public mind with the name of the appellant, including the word "*Lane*." Similarly, appellees use the word "Maternity" together with the word "*Lane*" as their name. In advertising, appellees also use the phrase "Mothers-to-be." In all respects save one the combination of words used by appellees is identical with that used by the appellant. The only difference is that appellees do

not add the word "*Bryant*" to the word "*Lane*." Appellant does not contend that it can have any exclusive right to the use of the word "Maternity," or the use of the phrase "Mothers-to-be," or the use of the word "*Lane*." It is only the combination of these words which is deadly to appellant. The combination of "Maternity" and "*Lane*" in an intimate association means appellant to the public.

It is our belief that confusion between these combinations is not only possible,—it is highly probable.

Since the only question now at issue is whether the complaint states a cause of action, this need not be finally determined on this appeal. For certainly we are entitled to prove the likelihood, and, if we can, the actuality of such confusion.

E.

The Fact That Appellees' Names Are "*Lane*" Does Not Aid Them.

No reluctance to reverse the trial court's decision in this case should be occasioned by the fact that the individual appellees' names are "*Lane*." Their names are not "*Maternity Lane*" they are *Jack Lane, Jr.*, *Jane Lane*, and *Lucille Lane*. In selecting a name under which to do business, they did not emphasize the dissimilarity between their name and appellant's, as would have been the case had they used any one of their individual names. Instead, whatever their intentions may have been, in fact they increased the danger of confusion by using merely the word "*Lane*" and coupling it with the word "*Maternity*," which, while general, is very closely associated in the public's mind with the word "*Lane*" in "*Lane Bryant*."

Appellant has pleaded in its complaint that appellees' intent, in adopting this name, was to divert customers from appellant. Appellant is entitled to prove its allegation, for, as was said in *Jackman v. Mau*, 78 Cal. App. (2d) 234, 239, 177 P. (2d) 599, 602:

“ . . . And the fact that defendant was using his own name does not shield him from injunctive action if such use is calculated to cause confusion or to deceive.”

The same result obtains if it be found, despite lack of fraudulent intent, that the names are sufficiently similar to cause confusion and injury.

In *Jackman v. Mau*, *supra*, the court, in part quoting *Hoyt Heater Co. v. Hoyt*, 68 Cal. App. (2d) 523, 527, 157 P. (2d) 657, 659, stated that:

“ ‘One must use his own name honestly and not as a means of pirating the good will and reputation of a business rival; and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business.’ Also, it is not necessary as a prerequisite to obtaining equitable relief in cases of this character that the names be identical. *It is sufficient if though not identical they are sufficiently similar as to cause confusion and injury.*” (Italics added.)

And again, in the same case the court stated, 78 Cal. App. (2d) 240, 177 P. (2d) 603:

“ . . . This doctrine (of unfair competition) rests on the basis of fraud and may be invoked when there is present an intent to deceive, *or the doing of things reasonably likely to deceive.*” (Italics added.)

Accord:

L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 S. Ct. 91, 59 L. Ed. 139;

Herring-Hall-Marvin Safe Co. v. Hall Safe Co., 208 U. S. 554, 559, 52 L. Ed. 616, 620, 28 S. Ct. 350.

And see:

Brooks Bros. v. Brooks Clothing of California, 60 Fed. Supp. 442, 449; affirmed by this Court, 158 F. (2d) 798.

II.

Appellant Stated a Cause of Action for Trade-Mark Infringement.

Appellant's name is regularly registered as a trade-mark under the laws of the United States. Paragraph VII of the complaint states:

“Commencing in 1911, ‘Lane Bryant’ was used in said business as a common law trade-mark. Application for registration thereof was filed in the United States Patent Office on October 20, 1927, and issued as trade-mark No. 238911 on February 14, 1928.”

The complaint further states that the acts of appellees which are complained of were done in violation of appellant's exclusive right to its trade-mark [paragraph XVI of Complaint, Tr. 7]. The complaint shows that appellant's business is one in interstate commerce, and that appellees have solicited mail order business for maternity apparel throughout the United States by means of an advertising program in nationally circulated magazines, using in its business the name “*Maternity Lane*.” [Complaint, par. XIII, Tr. 6.]

Under the Lanham Act, infringement of appellant's trade-mark by advertising is actionable. The Lanham Act, 15 U. S. C. A. section 1114 (1) provides as follows:

"Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, . . ."

In determining whether or not there has been an infringement of appellant's trade-mark, the question is whether appellees' name, used as a trade-mark, is so similar to appellant's as to cause confusion. Thus, it is stated in section 717 of the *Restatement* of Torts that:

"(1) One infringes another's trade name, if

(a) without a privilege to do so, he uses in his business, in the manner of a trade-mark or trade name, a designation which is identical with or confusingly similar to the other's trade name, though he does not use the designation for the purpose of deception, and . . ."

In determining this question a mere examination of the two names, without the benefit of proof setting two names in their actual context of use, including to the extent possible, proof of the actual degree of deception, is always unsatisfactory. As was observed by Judge Stone in *S. S. Kresge Co. v. Winget Kickernick Co.* (C. C. A. 8th), 96 F. (2d) 978, at 987-988:

“ . . . While trademark infringement issues may be presented and determined on the basis of a bare comparison of the marks, yet it is evident that an entirely different situation is presented where the court has not only the marks before it but evidence of actual experience in the trade in the use thereof. Whatever the conclusion of the Judge might be upon merely a comparison of the marks, clearly he must be governed by what he believes the evidence shows as to actual experience in the trade. It is the view of and effect upon the purchasing public which is determinative.”

Nims, in his text on *Unfair Competition* in Volume 2, section 320, at pages 1019-20-21 (4th Ed.), has well stated the reasons why this must be so:

“Courts have often considered the direct comparison of the articles the best test of similarity. ‘The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison thus made of the two is the surest, and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation.’ But the inadequacy of such a test is obvious, when one considers how seldom in actual purchase of goods the buyer has the opportunity of placing the various brands of

competing goods side by side and comparing them as carefully as does a judge in the judicial atmosphere of a court room.

“The test is *not* whether there is a difference which will be recognized, by the purchaser who sees the two competing articles placed side by side, but a difference which will be recognized by the consumer who has no chance to compare, when making his purchase. If the average buyer is likely to fail to distinguish the defendant’s name or mark from his memory or image of the plaintiff’s name or mark, which he carries in his mind, no infringement exists. ‘. . . it is not necessary that the resemblance should be such as would mislead an expert, or such as would not be easily detected if the original and spurious were seen together.’ . . .

“For these and other reasons, as said above, the side by side comparison in the court room is not a final test of similarity. The purchaser buying by mail, by telephone, has no chance to compare the plaintiff’s goods with the defendant’s. If he has one article before him, the best he can do is to compare it with his *memory* of the other.

Sir Wilfrid Greene, as Master of the Rolls, in criticizing the ‘ocular comparison’ test applied by the court below, said that it would ‘divorce the law of trade-marks from business realities.’

“Therefore, though the opinion of the court as to confusing similarity is controlling, and the articles themselves, and the trade-marks upon them, are the most important exhibits, these should be considered in the light of evidence as to the conditions under which the goods are sold and the habits of the purchasers of them.”

As was said in *William Waltke & Co. v. Geo. H. Schaffer & Co.*, (C. T. of Ap., D. C.) 263 Fed. 650, at 652:

“ . . . Of course, if the intending purchaser could see both marks together, he would readily note the difference between them; but if, upon seeing only one, he must rely upon his memory of the other, he would not be likely to apprehend the distinction. He acts quickly and upon impression. He is governed by a casual glance. (Citations.) Under such circumstances he would be apt to mistake the one for the other, and thus would occur the confusion against which the statute is leveled.”

The names have to be considered in context, which can be done only on a trial. For this reason the variety of names, superficially dissimilar, which have been held to infringe are almost infinite. A few examples are “Knox-all” as against “Beats-All” (*American Lead Pencil Co. v. Gottlieb* (S. D. N. Y., 1910), 181 Fed. 178); “Cashmere Bouquet” as against “Violets of Cashmere” (*Colgate v. Adams* (Circuit Court, N. D. Ill. N. D.), 88 Fed. 899); “Inner Seal” as against “Factory Seal” (*National Biscuit Co. v. Swick* (W. D. N. Y., 1923), 121 Fed. 1007). And likewise, “Kiddy-Koop” and “Kumfy-Krib” (*Trimble v. Woodstock Mfg. Co.*, 297 Fed. 524 (W. D. N. Y., 1923); affirmed 297 Fed. 529 (C. C. A. 2), were held to infringe. If a further accumulation of cases can be of any service, a collection of about 100 cases in which differences and resemblances run the gamut is set forth at pp. 706 through 713 of the 4th Edition of *Nims, supra*. We do

not believe it worth while to weary the court by accumulating all these comparisons here.

Where, as in the present case, the names have a certain amount in common and a small amount of difference, a final decision should await full hearing on the merits, in which the court can determine as a fact on the evidence the actual danger of confusion. As *Nims* states (p. 706) in *Unfair Competition and Trade-Marks* (4th Ed.):

“ . . . in almost every case there are facts outside of the words or devices which constitute the trade-marks, and outside of the nature of the goods, which are likely to have influenced the decision.”

In *Avrick v. Rockmont Envelope Co.* (C. C. A. 10th), 155 F. (2d) 568, this principle is strikingly illustrated. This was an action by the owner of the trade-mark “Sky Rite” for air mail stationery to enjoin defendant from using the words “Sky Mail” on its air mail stationery. There was a motion for summary judgment under Rule 56 of the Rules of Civil Procedure.

The trial court, although recognizing the rule that if a genuine issue of fact was presented by the record, the motion should be denied, concluded from a visual comparison of the products of the parties, that there was no close similarity, and granted the motion. The Circuit Court of Appeals reversed the District Court, even though it was inclined to agree that the two exhibits *were* so dissimilar that there was little probability of confusion. The allegations that the defendant intended to create confusion

and deceive purchasers created an inference of confusing similarity that the trial court must factually resolve.

In the language of the court (p. 573):

“While from a comparison of the two specimens side by side we think there is little likelihood that the ordinary purchaser, while exercising due care and caution, would be misled and deceived into accepting ‘Sky Mail’ as and for ‘Sky-Rite,’ we doubt the propriety of summarily deciding that question as a matter of law on this record. An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one’s fundamental right to his full day in court. In cases of this kind where no single factor controls the equation, and the court is necessarily required to resolve the question of alleged intent in arriving at its judgment, we are of the opinion that justice can best be served by a trial of the question on its merits.”

This case, it will be observed, was submitted on pleadings, depositions and affidavits. If a full trial on the merits was necessary properly to determine the question of infringement, surely it is also required in the case at bar, in which the decision rests solely on the sufficiency of the complaint.

III.

The Trial Court Erred in Denying a Preliminary Injunction. The Trial Court Erred in Its Finding With Respect to the Preliminary Injunction.

The trial court ordinarily has a great deal of discretion in dealing with preliminary injunctions. Its decision to refuse such an injunction is ordinarily reversed only in an extreme case. The rule is subject to one sweeping exception. A ruling based wholly on a question of law receives no such special respect and, if the trial court is mistaken as to the law, its decision will of course be reversed.

Securities and Exchange Comm. v. Sunbeam Gold M. Co. (C. C. A. 9), 95 F. (2d) 699;

City of Covington v. Cincinnati N. & C. Co. (C. C. A. 5), 71 F. (2d) 117.

In this case the trial court's disposition of the motion for preliminary injunction did not and could not involve any actual discretion. There is no discretion where only one decision is possible, and the court, once it ruled in favor of the motion to dismiss, necessarily bound itself to deny the injunction. For a preliminary injunction is of course granted only to preserve the position of the parties pending a trial, and the decision that there could be no trial left no discretion to grant a preliminary injunction. This aspect of the case also must be controlled by the basic question, that is, whether the court erred in sustaining the motion to dismiss.

The applicability of the foregoing is not in the least altered because findings of fact and conclusions of law with respect to the denial of the preliminary injunction were made by the District Court. Nor is it of significance that those findings advert to various questions of fact just as if the trial court had exercised discretion. Since the trial court, by granting the motion to dismiss, made it impossible to grant a preliminary injunction, there were no such discretionary questions, and those findings of fact can be considered as no more than a hypothetical expression of opinion on questions which were not before the court. The courts of the United States are without jurisdiction to consider matters which are entirely moot.

We do not contend that this court should affirmatively decide that a preliminary injunction should be granted: we do contend that if the court erred in granting the motion to dismiss, the order denying the motion for a preliminary injunction was necessary consequence of that error, and should likewise be reversed, and the entire case remanded for further proper proceedings.

Conclusion.

Appellant appears on this appeal asking for its day in court, requesting merely that it be allowed the opportunity to prove the allegations of its complaint which, for purposes of this appeal, are admitted. If the judgment below is to be sustained, the necessary implication is that under the laws of California and of the United States it is not improper to utilize a name partially similar and partially different, with similar advertising, to that of another, with the intent to take the business of that other, and likewise that the entry of a new comer in a new field in which a competitor previously occupied a strong position, with a name confusingly similar to that of the previous occupant, may not be enjoined. We do not believe that confusion of goods has suddenly become permissible, nor do we believe that fraud has suddenly ceased to be objectionable.

Respectfully submitted,

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No. 11940

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE, LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

	PAGE
Statement of the case.....	1
Analysis of appellant's complaint and affidavits.....	7
Summary of argument.....	8
Argument	10

I.

The denial of appellant's motion for preliminary injunction was proper	10
(a) The question of the appellant's right to a preliminary injunction is not moot.....	10
(b) The findings of fact on appellant's motion for preliminary injunction were in all respects proper and were fully supported by the evidence before the court.....	11
(c) The court correctly concluded on the basis of the undisputed evidence that the names used in business by appellant and appellees are not similar and that the public is not likely to be confused or misled thereby....	15
(d) The court correctly concluded on the basis of the undisputed evidence that the words "maternity" "mother," "mother-to-be," and the advertising material used by the parties to this litigation were merely descriptive and could not be exclusively appropriated as part of a trade name	17
(e) The court correctly concluded on the basis of the undisputed facts that appellant was guilty of laches so as to preclude its right to a preliminary injunction....	19

II.

The granting of appellee's motion to dismiss was proper.....	22
(a) All the affidavits were properly before the court in connection with its ruling on the motion.....	22
1. A speaking motion is permitted under the Federal Rules of Civil Procedure.....	22
2. A motion to dismiss in such circumstances may properly be considered as a motion for summary judgment	28
3. Appellant made no objection in the court below to the use of affidavits in connection with the motion to dismiss, and may not make the objection for the first time on appeal.....	30
(b) There is nothing in the record to show that the court below considered any documents other than those filed by appellant	31
(c) On the basis of the complaint alone, no claim for re- lief is stated.....	33
Conclusion	40

TABLE OF AUTHORITIES CITED

CASES	PAGE
Academy of Motion Picture Arts & Sciences v. Benson, 15 Cal. 2d 685	14, 37
American Brewing Co. v. Bienville Brewery, 153 Fed. 615.....	36
Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51.....	18
Anargyros & Co. v. Anargyros, 167 Fed. 753.....	21
Banzahf v. Chase, 150 Cal. 100.....	37
Best Foods v. Hemphill Packing Co., 295 Fed. 425.....	21
Boro-Hall Corp. v. General Motors Corp., 124 F. 2d 822.....	24
British American Tobacco Co. v. British American Cigar Co., 211 Fed. 933.....	14
Brooks Bros. v. Brooks Clothing of California, 60 Fed. Supp. 442; aff'd 158 F. 2d 798; cert. den. 328 U. S. 217....	21, 34, 35, 40
C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944.....	21
California Prune Assn. v. Nicholson Co., 69 Cal. App. 2d 207....	14
Carolina Pines v. Catalina Pines 128 Cal. App. 84.....	37
Carroll v. Morrison Hotel Co., 149 F. 2d 404.....	24
Central Mexico Light & Power Co. v. Munch, 116 F. 2d 85.....	24, 28
Columbia Mill Co. v. Alcorn, 150 U. S. 460.....	18
Del Monte Special Food Co. v. Calif. Packing Corp., 34 F. 2d 774	14
Eastern Columbia v. Waldman, 30 Cal. 2d 268.....	37
Ellis v. Stephens, 126 F. 2d 263.....	24
Estes v. Worthington, 22 Fed. 822.....	21
Flintco v. Philip Cherry Co., 113 F. 2d 850.....	21
Gallup v. Caldwell, 120 F. 2d 90.....	24
Hainque v. Cyclops Iron Works, 136 Cal. 351.....	37
Havana Commercial Co. v. Nichols, 155 Fed. 302.....	21
Hoover Co. v. Groger, 12 Cal. App. 2d 417.....	37

	PAGE
Hoyt Heater Co. v. Hoyt, 68 Cal. App. 2d 523.....	37
Italian-Swiss Colony v. I. Vineyard Co., 158 Cal. 252.....	38
Joint Council etc. Co. v. L. & W. Railroad Co., 157 F. 2d 417....	24
Kithcart v. Metropolitan Life Insurance Co., 150 F. 2d 997.....	28
Land v. Dollar, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 903....	26
Lerner Stores Corp. v. Lerner, 162 F. 2d 160.....	14, 38, 39
Local No. 1470 etc. v. So. Pac. Co., 131 F. 2d 605.....	24
Lucking v. Delano, 129 F. 2d 283.....	24
Mississippi Publishing Corp. v. Murphee, 326 U. S. 438, 68 S. Ct. 242, 90 L. Ed. 185.....	29
Modesto Creamery v. Stanislaus etc. Co., 168 Cal. 289.....	37
Monaghan v. Hill, 140 F. 2d 31.....	31
National Biscuit Co. v. Kellogg Co., 305 U. S. 111.....	18
National War Labor Board v. Montgomery Ward Co., Inc., 144 F. 2d 528.....	24, 28
Physicians Electric Corp. v. Adams, 79 Cal. App. 2d 550.....	37
Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6....	22, 24
Purity Springs Water Co. v. Redwood Ice Co., 203 Cal. 286.....	18
Quigley Publishing Co. v. Showman's Round Table, 7 Fed. Supp. 410	21
R. B. Davis Co. v. Davis, 75 F. 2d 499.....	21
Samara v. United States, 129 F. 2d 594; cert. den. 317 U. S. 686	24, 28
Scudder Food Products, Inc. v. Ginsberg, 21 Cal. 2d 596.....	26, 34
Sunmaid Raisin Growers v. Mossesion, 84 Cal. App. 485.....	14
Van Camp Sea Food Co. v. Cohn-Hopkins, 56 F. 2d 797.....	18
Victory v. Manning, 128 F. 2d 378.....	24
Weeks v. Bareco Oil Co., 125 F. 2d 84.....	24
Weinstock, Lubin & Co. v. Marks, 109 Cal. 529.....	37

RULES

PAGE

Equity Rule 29 (28 U. S. C. A., Sec. 723).....	22, 23
Federal Rules of Civil Procedure, Rule 12(b).....	23, 24, 28, 29
Federal Rules of Civil Procedure, Rule 52(a).....	11
Federal Rules of Civil Procedure, Rule 56.....	30
Federal Rules of Civil Procedure, Rule 56(e).....	28
Federal Rules of Civil Procedure, Rule 86(d).....	29
Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Rule 20, Subsec. 2(d).....	20

TEXTBOOKS

O'Brien's Manual of Federal Appellate Procedure (3rd Ed.), p. 208	20
O'Brien's Manual of Federal Appellate Procedure (3rd Ed., 4th Cumulative Supplement), p. 64.....	20, 31

No. 11940
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE, LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

APPELLEES' BRIEF.

*To the Honorable Judges of the United States Circuit
Court of Appeals, for the Ninth Circuit:*

Come now Maternity Lane, Ltd., of California, a corporation, Jack Lane, Jr., Jane Lane and Lucille Lane, appellees herein and in reply to the appellant's opening brief, respectfully state as follows:

Statement of the Case.

Appellees deem it necessary to supplement the statement of the case as set forth on pages 2 to 6 of appellant's opening brief. This action was commenced by the appel-

lant on October 2, 1947, when it filed the following documents in the court below:

Complaint for Injunction [Tr. 2-8];

Notice of Motion for Preliminary Injunction [Tr. 9];

Affidavit of Raphael Bryant Malsin in Support of Motion for Preliminary Injunction [Tr. 10-20];

Affidavit of Harold F. Birnbaum in Support of Motion for Preliminary Injunction [Tr. 21].

The allegations of the complaint are well summarized by appellant on pages 3 to 6 of appellant's opening brief. As stated by appellant on page 6 of its opening brief, the affidavits "set forth the same material alleged in the complaint in greater detail, with numerous Exhibits relating to instances of the alleged infringement of trademark and unfair competition."

The detail and exhibits referred to are significant because even appellant concedes that they were properly before the court below in connection with its ruling on appellant's motion for preliminary injunction and, as appellees contend, were properly before the Court in connection with the Court's ruling on appellees' motion to dismiss.

It was alleged in paragraph VI of the complaint [Tr. 3] that "from its inception said business [appellant's] specialized in maternity apparel and apparel for stout women." This allegation is repeated in the affidavit of Raphael Bryant Malsin [Tr. 10] and the affidavit goes on to say that of appellant's consolidated net sales for the years 1937 through 1946 "approximately 5% were sales of maternity apparel" [Tr. 11]. The complaint [Tr. 3] and Mr. Malsin's affidavit [Tr. 10] contain

allegations that the appellant has stores and sales outlets in several eastern states and midwestern states, going as far west as the states of Minnesota, Iowa and Missouri. Appellant alleges in paragraph VIII of his complaint [Tr. 4], and in the affidavit of Mr. Malsin [Tr. 11], that it engages in the mail order business, and Mr. Malsin states in his affidavit that 25% of the net sales of appellant were mail order sales, and that for the years 1939 through 1947, appellant distributed more than two million catalogs for the mail order sale of maternity apparel of which 50,000, or 1/40th, were mailed to customers living in the state of California, of which 6200 were mailed to customers in Los Angeles, California, or approximately 1/300ths of the total number of catalogs mailed between 1939 and 1947.

Attached to, and made a part of Mr. Malsin's affidavit, were the following exhibits:

(a) Appellant's Mail Order Catalog for Maternity Apparel for the Spring and Summer of 1947 [Tr. 20];

(b) Trademark registration, registered by appellant with the United States Patent Office, on February 14, 1928;¹

(c) Reproduction of the advertisements used by appellant in advertising its mail order catalog for

¹Pursuant to an order of this court, all exhibits attached to the affidavit of Raphael Bryant Malsin in support of preliminary injunction, filed October 7, 1947, all exhibits attached to the affidavit of Harold Birnbaum in support of motion for preliminary injunction, and all exhibits attached to the affidavit of Jack Lane, Jr., in support of motion to dismiss and in opposition to motion for preliminary injunction filed October 17, 1947, were not printed or reproduced and may be considered by this court in their original form. [Tr. 61-62.]

the Spring and Summer of 1947 [Exhibit "A" aforementioned], similar advertisements published by appellant in connection with its mail order catalog for Fall and Winter of 1946-1947, for the Spring and Summer of 1946, for the Fall and Winter of 1946, for the Spring and Summer of 1945, and for the Fall and Winter of 1944;

(d) A reproduction of the cover page of the 1918 maternity apparel catalog published by appellant;

(e) A reproduction of a newspaper advertisement published by appellant in 1947;

(f) Reproduction of a magazine advertisement published by appellant in 1947;

(g) A reproduction of an article pertaining to appellant appearing in Time Magazine of February 10, 1947;

(h) A photograph of the exterior of appellees' store in Los Angeles, California;

(i) A reproduction of a newspaper advertisement published by appellees in 1947;

(j) A reproduction of a magazine advertisement published by appellees in 1947;

(k) Copy of telegram sent by appellant's counsel to appellees dated February 15, 1946, protesting the use of the name "Maternity Lane" by appellees;

(l) Copy of letter written by appellant's counsel to appellees dated February 15, 1946, containing a similar protest;

(m) Copy of letter written by appellant's counsel to appellees dated January 7, 1947, containing a similar protest.

The affidavit of Harold Birnbaum [Tr. 21] filed by appellant at the same time as its complaint was filed, contained as exhibits thereto numerous specimens of newspaper advertisements used by appellees.

Appellees on October 7, 1947, filed their Notice of Motion to Dismiss the Complaint on the ground that it failed to state a claim against appellees upon which relief could be granted [Tr. 22]. At the same time, appellees filed the affidavit of Jack Lane, Jr., in support of their Motion to Dismiss and in opposition to appellant's Motion for Preliminary Injunction [Tr. 23-26]. In that affidavit the affiant stated that he was president and active manager of the corporate appellee; that the corporate appellee was engaged exclusively in the sale at retail of maternity apparel; that no other kind of merchandise was sold by appellees; that all of the stock of the corporate appellee was owned by individuals having the surname "Lane"; that the name was selected because the appellees felt it pleasantly and distinctly described the type of business to be engaged in by the appellees, and also made use of the surname of the family owning all of the corporate appellee's stock; that the advertising material was selected without any reference to appellant's advertising; that the phrases "mother-to-be" and "mothers-to-be" had been found by affiant in mail order catalogs used by Sears-Roebuck & Co., and Montgomery-Ward & Co., in connection with the sale of maternity apparel. Attached to and made a part of said affidavit were numerous specimens of maternity apparel advertising, where the phrase "mothers-to-be" was used. The advertising specimens included newspaper and magazine advertisements for stores throughout the United States. The affidavit also contained allegations to the effect that as soon as appellant made known its objection to script-type lettering, appellees

immediately discontinued the use of script in their advertising; this allegation was not disputed.

The affidavit of Max L. Raskoff was filed by appellees in support of their motion to dismiss and in opposition to appellant's motion for preliminary injunction [Tr. 27-29]. That affidavit contained allegations to the effect that affiant was, at the time during which negotiations were carried on between the parties prior to the filing of this suit, the attorney for the appellees; that shortly after receipt of the telegram and letter sent by appellant's counsel to appellees [Exhibits "K" and "L" to the affidavit of Raphael Bryant Malsin], dated February 15, 1946, the affiant replied that he had advised appellees that the names of the parties were not similar and appellees were not violating appellant's trademark or engaging in unfair competition with appellant; that no reply was ever received to said letter and that the next communication received in connection with this controversy was dated January 7, 1947, which was a letter from appellant's Los Angeles counsel and which is attached to the affidavit of Mr. Malsin and marked Exhibit "M" thereto; that after the receipt of said letter, extensive negotiations were carried on between January 7, 1947, and the month of August, 1947, and at no time during said negotiations was any mention ever made of any alleged resemblance between the script lettering used in advertising by the appellees and the appellant, and that in August 1947 such contention was made by appellant, whereupon appellees voluntarily ceased using script-type lettering in any of their advertising material. The affidavit also stated that at no time during the negotiations, prior to the receipt of the complaint from appellant was ever any claim made by appellant as to the use of the phrases "mother-to-be," or "mothers-to-be."

Analysis of Appellant's Complaint and Affidavits.

The gist of the cause of action attempted to be asserted by appellant in its complaint is that by reason of the similarity of the name "Lane-Bryant" and the name "Maternity Lane" . . . "the public will be deceived and defrauded." There is no allegation that the appellant's name was known by the public as anything other than "Lane-Bryant" or that appellees' name was known in any way other than "Maternity Lane." There is also a complete absence of any allegation that any members of the public have actually been misled.

Appellant concedes that the Court properly considered the complaint and all the affidavits on file in connection with its ruling on the motion for preliminary injunction. The affidavits show, without any conflict whatsoever, that appellant did in excess of \$40,000,000.00 worth of business a year, of which only 5% was in connection with maternity apparel and apparently 95% was in connection with the sale of clothing for stout women; that appellees engaged exclusively in the sale of maternity apparel; included were copies of the alleged infringing and unfairly competing advertising material, the lettering complained of, and the examples of the use of the phrase "mothers-to-be"; and that on February 15, 1946, appellants protested appellees' use of the name "Maternity Lane" but did not file their action to enjoin appellees until October 2, 1947.

SUMMARY OF ARGUMENT.

On the basis of the authorities hereinafter referred to, the rulings of the learned District Court on appellant's motion for preliminary injunction and appellees' motion to dismiss, should be affirmed.

I.

The denial of appellant's motion for preliminary injunction was proper.

(a) The question of appellant's right to a preliminary injunction was not moot.

(b) The findings of fact on appellant's motion for preliminary injunction were in all respects proper and were fully supported by the evidence before the Court.

(c) The Court correctly concluded on the basis of the undisputed evidence that the names used in business by appellant and appellees are not similar and that the public is not likely to be confused or misled thereby.

(d) The Court correctly concluded on the basis of the undisputed evidence that the words "maternity," "mother," "mother-to-be," and the advertising material used by the parties to this litigation were merely descriptive and could not be exclusively appropriated as part of a trade name.

(e) The Court correctly concluded on the basis of the undisputed facts that appellant was guilty of laches so as to preclude its right to a preliminary injunction.

II.

The granting of appellees' motion to dismiss was proper.

(a) All the affidavits were properly before the Court in connection with its ruling on the motion.

(1) A speaking motion is permitted under the federal rules of civil procedure.

(2) A motion to dismiss in such circumstances may properly be considered a motion for summary judgment.

(3) Appellant made no objection in the court below to the use of affidavits in connection with the motion to dismiss and may not make the objection for the first time on appeal.

(b) There is nothing in the record to show that the court below considered any documents other than those filed by appellant.

(c) On the basis of the complaint alone, no claim for relief is stated.

ARGUMENT.

I.

The Denial of Appellant's Motion for Preliminary Injunction Was Proper.

(a) The Question of the Appellant's Right to a Preliminary Injunction Is Not Moot.

Appellant, on pages 37 and 38 of its brief, summarily disposes of the ruling of the trial court on its motion for preliminary injunction by saying that the question is moot on this appeal. An analysis of the situation, however, demonstrates that appellant's contention is unsound and the trial court's ruling on appellant's motion for a preliminary injunction is not moot. While we contend that the trial court ruled properly both with respect to appellees' motion to dismiss and appellees' motion for preliminary injunction, if this Court should see fit to reverse the ruling of the trial court in connection with the motion to dismiss, the preliminary injunction issue would be a very real one. In that event the case would be remanded to the District Court for further proceeding.

Appellant made the motion for preliminary injunction and submitted affidavits in support thereof. Appellees submitted affidavits in opposition to the motion for preliminary injunction, and appellant filed counter-affidavits. Appellant made no contention that it was in any way surprised by the hearing on the motion for preliminary injunction or that it was denied any opportunity to present any proof or evidence or any further affidavits. Appellant filed four affidavits in support of its motion, containing numerous exhibits of the allegedly unfairly competing material. After hearing the arguments of counsel, and considering the affidavits of the parties, the Court made

findings of fact and conclusions of law, and denied the motion for preliminary injunction.

If the appellant's contention be correct, then if the appellant is successful in connection with its appeal from the order granting appellees' motion to dismiss, the question of appellant's right to a preliminary injunction would be in exactly the same situation as it was prior to the Court's ruling thereon. Does appellant wish to have the entire question of the right to preliminary injunction re-determined in the event of a possible reversal by this Court of the order granting the motion to dismiss? Appellant concedes that in ruling on a motion for preliminary injunction the trial court has a very wide discretion, and appellant has failed to mention any respects in which the discretion was abused, merely contending that the act of denying the motion for preliminary injunction was automatic. The findings of fact and conclusions of law made by the Court in connection with its ruling on the motion for preliminary injunction demonstrate that its ruling was not automatic.

Nor has appellant on this appeal pointed to any single finding of fact or to any conclusion of law with which it takes issue.

(b) The Findings of Fact on Appellant's Motion for Preliminary Injunction Were in All Respects Proper and Were Fully Supported by the Evidence Before the Court.

Rule 52(a) of the Rules of Civil Procedure for the District Court of the United States provides:

"In all actions tried upon the facts without a jury [or with an advisory jury], the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate

judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for the purposes of review. Findings of fact shall not be set aside unless wholly erroneous, . . .”²

While appellant’s brief contains no objection or specification of error with respect to any of the findings, in the Statement of Points Upon Which Appellant Intends to Rely on Appeal [Tr. 60], one of the points specified is that the court erred in making a finding as to appellees’ lack of fraudulent intent, as contained in Finding No. 9. Accordingly, none of the remaining findings shall here be considered inasmuch as appellant does not assert any error in connection therewith on this appeal.

The issue of whether or not the appellees intended or attempted to pass themselves off as appellant was before the trial court in the form of contradictory affidavits filed by the respective parties. Appellant alleged in paragraph 14 [Tr. 6] of its complaint, that “defendants in the conduct of their business are endeavoring to pass themselves off as being connected with plaintiffs in a manner and with the intent to deceive the public, and to cause the public to believe that maternity apparel sold by plaintiff can be purchased at the retail store of said defendants or by mail order from it.” Again in paragraph 15 [Tr. 7] of appellant’s complaint, it is alleged that appellees have

²The rule in effect and which governed the proceedings below did not contain the phrase in brackets. That phrase was added by the 1946 amendments to the Federal Rules.

“intensified their simulation of plaintiff and plaintiff’s corporate name and trademark.”

In the affidavit of Raphael Bryant Malsin, filed by appellant in support of its motion for preliminary injunction, there are numerous similar allegations concerning the intent of appellees. Thus the affiant states [Tr. 16] “defendant is increasing its effort to hold itself out as being connected with plaintiff and imitates plaintiff’s name and slogan,” and again it is contended in that affidavit that appellees were guilty of numerous similar acts of simulation and copying of appellant’s advertising material [Tr. 17].

These contentions of appellant as to appellees’ lack of good faith are directly and specifically contradicted in the affidavit of Jack Lane, Jr., when he states [Tr. 26]:

“At no time have defendants, or any of them, intended or attempted to pirate, copy or simulate any of plaintiff’s trademarks, slogans, lettering or advertising; nor have defendants, or any of them, at any time, intended or attempted to confuse or mislead the customers of either plaintiff or defendants, or any members of the public concerning defendants’ identity.”

Thus the issue of appellees’ intention and good faith was before the court upon the motion for preliminary injunction and we respectfully submit that the finding of good faith was fully supported by the evidence before the court. While it is true that positive proof of bad faith is not necessary to establish a cause of action for unfair competition if the conduct complained of is likely to mislead and cause confusion among members of the public,

Academy of Motion Picture Arts & Sciences v. Benson, 15 Cal. 2d 685; *Sunmaid Raisin Growers v. Mossesion*, 84 Cal. App. 485; *Del Monte Special Food Co. v. Calif. Packing Corp.*, 34 F. 2d 774, the question of the defendant's good faith is an important issue upon a motion for preliminary injunction. *British American Tobacco Co. v. British American Cigar Co.*, 211 Fed. 933. Moreover, the recent decision of this Court in the case of *Lerner Stores Corp. v. Lerner*, 162 F. 2d 160, indicates that this Court placed great importance upon the acts of the defendant evidencing his good faith. In that case this Court ruled that reasonable precautions had been taken by the defendant on every occasion where the so-called unfairly competing material was called to his attention.³ In the instant case it is undisputed that when appellant made objection to appellees' use of script lettering in appellees' advertising, appellees immediately discontinued the use of the script lettering in their advertising material. The trial court so found in Finding No. 8 [Tr. 47], and no objection to that finding has or could have been made.

Even the cases holding that proof of bad faith is not necessary to establish a cause of action for unfair competition give, as the reason for the rule, that bad faith "may be assumed where the facts indicate that a purchaser exercising ordinary care, would be likely to be deceived by imitation of a trademark." *Sunmaid Raisin Growers v. Mossesion*, 84 Cal. App. 485 at 497; *Calif. Prune Assn. v. Nicholson Co.*, 69 Cal. App. 2d 207 at 220. Con-

³In that case the plaintiff, doing business as "Lerner Shops," complained of the defendant's doing a similar business under the name of "Lerner's." When the plaintiff first objected, the defendant added to his name his first name and his shop was thereafter known as "Wilfred Lerner." The court ruled that these corrective measures of the defendant indicated his good faith.

versely, it would follow that where the facts indicate that a purchaser, exercising ordinary care, would not be likely to be deceived, it may be assumed that the defendant has not acted in bad faith. Thus in the instant case, in connection with its ruling on a preliminary injunction, the court had before it samples of all the advertising material which appellant contended was similar to and pirated from appellant. On the basis of this evidence the court concluded that there was no similarity. Certainly, had the appellees intended or attempted to pass themselves off as appellant, they would have selected a name and used advertising material similar to appellant's so as to confuse and mislead members of the public. In view of the conflicting affidavits, the inference of good faith follows naturally and logically from the conclusion that the names and the advertising material were not similar so as to resolve the conflict in favor of appellees and support the findings of the lack of bad faith.

(c) The Court Correctly Concluded on the Basis of the Undisputed Evidence That the Names Used in Business by Appellant and Appellees Are Not Similar and That the Public Is Not Likely to Be Confused or Misled Thereby.

The principal affidavit filed by appellant in support of its motion for a preliminary injunction was the affidavit of Raphael Bryant Malsin [Tr. 10]. In that affidavit the alleged acts of appellees which appellant contended were likely to cause confusion in the minds of the public between the identity of the parties were as follows [Tr. 17]:

1. Using a corporate name, which resembles and takes unto itself part of the corporate name and trademark of appellant, in the maternity apparel

business in which appellant has been engaged for many years;

2. Attempting in the course of such business to divert unto itself the goodwill of appellant by simulating its corporate name and by copying and paraphrasing the advertising slogans and phrases of appellant with respect to “mother-to-be” in connection with the use of appellant’s corporate name and trademark;

3. Seeking to divert appellant’s business unto itself by advertising for mail order business in the same media used by appellant, *i. e.*, nationally circulated magazines, under an imitative name and similar slogan;

4. Attempting to solicit a retail and mail order business under a name similar to appellant’s in a field in which appellant has been preeminent for more than 25 years.

A consideration of the aforementioned contentions of the appellant in the light of the evidence contained in the affidavits before the court, shows that the court properly ruled that there was no such similarity of names or of advertising material as to warrant the granting of a preliminary injunction. The corporate name of appellant, to-wit, Lane Bryant, is the name of the original founder of appellant’s business, Lane being the first name and Bryant the surname [Tr. 3, 10]. There is no allegation that the name of the appellant was shortened to Lane or to Bryant, and it would appear from the advertising material attached as exhibits to the affidavit of appellant that the name was known simply as “Lane Bryant.” Nor is there any allegation that appellees’ name was known

to the general public by any name other than "Maternity Lane." It is true that the appellees' name contains the word "Lane," which is a word used in the name of appellant, but is "Lane-Bryant" the same as "Maternity Lane," or so similar thereto that the public would be likely to be misled or confused as to the identities of the parties? We contend the names themselves are wholly dissimilar and that no reasonable person could be misled thereby.

"Lane-Bryant" and "Maternity Lane" do not look alike, and they do not sound alike. Moreover, the former is obviously the name of an individual, whereas the latter would seem to describe a path or walk—it is obviously not a personal name.

(d) The Court Correctly Concluded on the Basis of the Undisputed Evidence That the Words "Maternity" "Mother," "Mother-to-be," and the Advertising Material Used by the Parties to This Litigation Were Merely Descriptive and Could Not Be Exclusively Appropriated as Part of a Trade Name.

The second act complained of in Mr. Malsin's affidavit is the alleged use of the phrase "mother-to-be" in the advertising material used by appellees. Specimens of advertising used by both appellant and appellees were before the court as exhibits to the affidavits filed by appellant. These exhibits are before this court and may be considered by it in their original form, and we submit that no such similarity appears from the advertising. Moreover, attached to the affidavit of Jack Lane, Jr., were numerous specimens of advertising of maternity apparel used in Los Angeles and throughout the United States where the phrases "mother-to-be" and "mothers-to-be" are used. These phrases being composed exclusively of descriptive

words are not capable of exclusive appropriation as part of a trade name. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Van Camp Sea Food Co. v. Cohn-Hopkins*, 56 F. 2d 797; *Purity Springs Water Co. v. Redwood Ice Co.*, 203 Cal. 286; *National Biscuit Co. v. Kellogg Co.*, 305 U. S. 111. The frequent use of the phrases by other persons as indicated by the exhibits to Mr. Lane's affidavit shows that appellant has not in fact appropriated the phrase. Moreover, it should be noted that the papers filed by appellant in this case conclusively demonstrate that appellant has not even attempted to appropriate the phrase as part of its trade name. Exhibit "A" attached to the affidavit of Raphael Bryant Malsin filed by appellant in support of its motion for preliminary injunction is a 1947 mail order catalog published by appellant. Although appellant's name appears prominently on the cover and throughout said catalog, the word "maternity" does not appear on the cover thereof, nor does it appear in the catalog in close proximity to appellant's name. Moreover, a careful reading of said catalog will reveal that the phrase "mother-to-be" never appears in any part of said catalog. Exhibit "C" to said affidavit contains photostatic copies of advertisements of appellant's mail order catalog for the years 1944 to 1947. Each such advertisement contains a reproduction of the cover page of appellant's catalog for each of said years, and none of the covers of any of the catalogs for said years contains either of the descriptive phrases assertedly appropriated by plaintiff. The catalogs

for each of said years contains the phrase "expectant mother" in a prominent position, and it would seem that if any such descriptive phrase would be closely associated with appellant's, it would be the phrase "expectant mother."

The remaining acts complained of in Mr. Malsin's affidavit consist of the engagement in the mail order business by appellee and the attempt to solicit retail and mail order business. Appellant would seem to be objecting to competition, not unfair competition.

(e) The Court Correctly Concluded on the Basis of the Undisputed Facts That Appellant Was Guilty of Laches so as to Preclude Its Right to a Preliminary Injunction.

Finding No. 10 of the findings of fact signed by the court below in connection with its denial of appellant's motion for preliminary injunction reads as follows [Tr. 47]:

"Plaintiff had knowledge of the name and the business activities of the defendants since on or about February 15, 1946, and on that date and on several occasions thereafter, plaintiff protested to the defendants of the use by defendants of the name "Maternity Lane," in connection with the sale of maternity apparel. After negotiations between the parties, defendants refused to make any changes in the name under which they did business, whereupon plaintiff commenced this action on October 2, 1947."

Appellant, having made no objection to this finding, cannot assert any error in connection therewith on this ap-

peal.⁴ This finding fully supports the conclusion of laches. Indeed, appellant could not have raised any objection to Finding No. 10 inasmuch as that finding is based exclusively upon the facts set forth in papers filed by appellant in support of its motion for a preliminary injunction. The finding is based upon Mr. Malsin's affidavit filed by appellant in the court below in support of its motion for preliminary injunction [Tr. 16-17] and the exhibits attached thereto [Exhibits K, L and M], which this Court is respectfully requested to consider in their original form pursuant to the order of this Court filed in this case [Tr. 61]. These documents show that on the date appellees first opened their business in February, 1946, appellant made formal written protest of the name to be used and which was in fact used by appellees in the carrying on of their business. The allegations of the complaint and of Mr. Malsin's affidavit further show that despite such protests appellees refused to make any change in the name under which they did business, and yet appellant did not file its action until October 2, 1947, a period of approximately 19 months after appellant first had knowledge of and objected to the name under which appellees did business.

During those 19 months the appellees were engaged in business under the name "Maternity Lane." Clearly appellant's delay is of itself sufficient to show that there was no need for preliminary injunction. Laches is a defense

⁴Subsection 2(d) of Rule 20 of the Rules of the Circuit Court of Appeals for the 9th Circuit; see also O'Brien Manual of Federal Appellate Procedure (3rd Ed.), page 208; see also 4th Cumulative Supplement to O'Brien's Manual of Federal Appellate Procedure (3rd Ed.), page 64.

to a request for a preliminary injunction in a case involving alleged unfair competition, or trademark infringement.

Estes v. Worthington, 22 Fed. 822;

C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944;

Havana Commercial Co. v. Nichols, 155 Fed. 302;

Best Foods v. Hemphill Packing Co., 295 Fed. 425;

Quigley Publishing Co. v. Showman's Round Table,
7 Fed. Supp. 410.

Such a finding and conclusion cannot be considered to be an adjudication on the merits of the controversy, inasmuch as laches is no defense to a permanent injunction. (*Brooks Bros. v. Brooks Clothing Co. of Calif.*, 67 Fed. Supp. 442, aff'd 158 F. 2d 798, cert. den. 328 U. S. 217.) It is elementary law that a preliminary injunction is an extraordinary remedy and should only be granted to preserve the *status quo* and then only when the case presented is clear and free from reasonable doubt. In the instant case the granting of a preliminary injunction would have effectively disposed of the entire controversy. Accordingly, it was incumbent upon appellant to establish a clear case of irreparable damage to warrant the granting of a preliminary injunction. All the papers filed by appellant herein do not indicate such a similarity of names as to warrant this extraordinary remedy. (*Anargyros & Co. v. Anargyros*, 167 Fed. 753; *Flintco v. Philip Cherry Co.*, 113 F. 2d 850; *R. B. Davis Co. v. Davis*, 75 F. 2d 499.) As conceded by appellant on page 37 of its opening brief, "the trial court ordinarily has a great deal of discretion in dealing with the preliminary injunction." No showing of any abuse of discretion has been made.

II.

The Granting of Appellees' Motion to Dismiss Was Proper.

(a) All the Affidavits Were Properly Before the Court in Connection With Its Ruling on the Motion.

1. A SPEAKING MOTION IS PERMITTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

On pages 9 to 11 of appellant's opening brief, the point is made that the court below committed error in considering the affidavits filed by the parties in connection with its ruling on the motion to dismiss. In support of this contention, appellants rely principally upon the decision of the United States Supreme Court in *Polk Co. v. Glover*, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6. That case, however, was decided on the basis of old equity Rule 29, 28 U. S. C. A., Sec. 723, which governed civil procedure in the Federal District Courts prior to the promulgation and effectiveness of the Federal Rules of Civil Procedure; the Federal Rules of Civil Procedure were effective on September 16, 1938, and superseded the Equity Rules. Of course the Federal Rules of Civil Procedure were in effect and governed the proceedings in the court below.

The decision of the Supreme Court in the case of *Polk Co. v. Glover* was based upon the express limitation contained in Equity Rule No. 29 which was being construed by the court. That rule provided:

"Every defense in point of law *arising upon the face of the bill*, whether for misjoinder, non-joinder, or insufficiency of fact to constitute a valid cause of action in equity . . . shall be made by motion to dismiss. . . ." (Emphasis added.)

In view of the italicized provision of the Rule, the motion obviously could be aimed only at matters appearing in the bill. There is no such limitation in Rule 12(b) of the Federal Rules of Civil Procedure. The rule in effect at the time of the hearing in the court below read as follows:

“Every defense, in law *or fact*, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses *may* at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter,
- (2) Lack of jurisdiction over the person,
- (3) Improper venue,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted.” (Emphasis added.)

The differences between Rule 12(b) and former Equity Rule 29 are apparent. Equity Rule 29 imposed a positive requirement that the defenses in point of law there specified be made by motion to dismiss. Rule 12(b), on the other hand, applied to defenses in law and fact and permitted the assertion of such defenses either “in the responsive pleading” or “at the option of the pleader” by motion. It would seem, therefore, that the express provisions of Rule 12(b) made a motion to dismiss as broad as any of the defenses that could be asserted in an answer and thus permit a “speaking motion.”

A majority of the circuits that have considered the question have so held.⁵ All of the circuits that have considered this question under Rule 12(b) of the Federal Rules have reached their decision subsequent to the decision of the Supreme Court in the case of *Polk Co. v. Glover, supra*.

In the case of *Gallup v. Caldwell* (C. C. A. 3rd, 1941), 120 F. 2d 90, the defendant moved to dismiss part of the complaint on the ground that plaintiff in a secondary class action by a shareholder of a corporation was not in fact a shareholder at the time of the transaction complained of and the motion was supported by affidavits. The motion was sustained, and the propriety of the speaking motion was justified in the following language:

"The problem which, restated, is whether the Federal Rules of Civil Procedure countenance a 'speaking motion' to dismiss, has been much discussed since the adoption of the rule. Each side of the question has drawn to it distinguished proponents. Their arguments and reasons are collected in a note in 9 George

⁵FIRST CIRCUIT: *Ellis v. Stephens*, 126 F. 2d 263.

SECOND CIRCUIT: *Boro-Hall Corp. v. General Motors Corp.*, 124 F. 2d 822; *Samara v. United States*, 129 F. 2d 594, cert. den. 317 U. S. 686; *Central Mexico Light & Power Co. v. Munch*, 116 F. 2d 85; *Joint Council etc. Co. v. L. & W. Railroad Co.*, 157 F. 2d 417.

THIRD CIRCUIT: *Gallup v. Caldwell*, 120 F. 2d 90; *Victory v. Manning*, 128 F. 2d 378.

FIFTH CIRCUIT: *Local No. 1470 etc. v. So. Pac. Co.*, 131 F. 2d 605.

SIXTH CIRCUIT: *Lucking v. Delano*, 129 F. 2d 283.

SEVENTH CIRCUIT: *Weeks v. Bareco Oil Co.*, 125 F. 2d 84; *Carroll v. Morrison Hotel Co.*, 149 F. 2d 404.

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA: *National War Labor Board v. Montgomery Ward Co., Inc.*, 144 F. 2d 528.

Washington Law Review, 174 (December 1940). We think that such procedure should be permitted especially in the kind of situation here presented. See 1 Moore's Fed. Practice 645. Despite plaintiff's allegation of stock ownership, it is clear that she was not a stockholder whose ownership was registered on the books of the corporation at the time suit was instituted. If record ownership is a prerequisite to the right to bring this action, then it is expedient that the point be decided preliminarily. The alternative would be to sanction discovery and perhaps other pretrial proceedings likely to be exceedingly burdensome upon both parties only to have the case ultimately dismissed at the trial because of the plaintiff's inability to prove a fundamental but initial point. This would not only be a needless waste of the court's time but it would run counter to the mandate of Rule 1, that the rules 'be construed to secure the just, speedy, and inexpensive determination of every action.' "

The reasoning of the Third Circuit Court of Appeals applies with particular force to the instant case. Appellant's complaint contains numerous allegations with respect to the similarity of the advertising material used by the parties. In the affidavits filed by appellant itself examples of this alleged unfairly competing advertising material are attached as exhibits. An examination of these exhibits gives the court an opportunity to consider the allegations of similarity, which in the light of the exhibits become mere conclusions. If the court feels as it did in the instant case that the advertising material and the lettering used are not similar in any way to that of the appellant, why should the court and the parties undertake the burden of a trial when it is apparent that the appellant could not establish its allegation? What more could have

been before the court, assuming a trial was had? The two names, *i. e.*, Lane-Bryant and Maternity Lane, were before the court in the complaint; the advertising material and the lettering complained of before the court in the affidavits of appellant.

The only other authority cited by appellant in support of its contention is the case of *Land v. Dollar*, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 903. The language quoted by appellant was not part of the opinion, but was contained in a footnote in Mr. Justice Douglas' opinion and a reading of the opinion demonstrates that the footnote was pure dictum and the cases cited by the Court in support of the footnote all arose under Equity Rule 39. It is also interesting to note that in the balance of the footnote, which was not included in the quotation reprinted by appellant in its brief in this case, the Supreme Court recognized the propriety of considering affidavits in connection with jurisdictional matters. That footnote, in addition, contained the following language:

“But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code Sec. 37, 28 U. S. C. Sec. 80, Federal Rule of Civil Procedure 12(b), the court may inquire by affidavit or otherwise into the facts as they exist.”

As conceded by appellant on page 12 of its opening brief, questions of unfair competition must be determined by applicable state law. The California Supreme Court in the case of *Scudder Food Products, Inc., v. Ginsberg* (1942), 21 Cal. 2d 596, had before it a question involving the propriety of the trial court's sustaining a demurrer to the plaintiff's complaint. In affirming the ruling of the

trial court, the California Supreme Court states (21 Cal. 2d at 601) :

“The theory of plaintiff is that defendants accomplished their alleged fraudulent purpose by imitating a distinct combination of features of size, shape, color arrangement, and textual similarities adopted by the plaintiff, and that by such means the public was misled. If, in fact, the plaintiff had pleaded such facts we have no doubt that it would have pleaded good causes of action. The difficulty with the first four causes of action is that plaintiff has pleaded either as exhibits or by description the alleged imitative containers and labels. An examination of such containers and labels demonstrates, as a matter of law, that no reasonable person could conceivably be misled into believing defendants’ containers and labels were those of plaintiff. While it ordinarily is a question of fact as to whether two containers and labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be misled, in this case the dissimilarities are so palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be misled.”

Thus in the instant case the court had before it examples of the alleged similar advertising material and held, as a matter of law, that they were not similar and that the public legally could not be misled.

2. A MOTION TO DISMISS IN SUCH CIRCUMSTANCES MAY PROPERLY BE CONSIDERED AS A MOTION FOR SUMMARY JUDGMENT.

Prior to the recent amendments to the Federal Rules, it had been held by several circuits that where a motion to dismiss for failure to state a claim upon which relief can be granted is supported by affidavits, the court may properly consider the motion as one for summary judgment pursuant to Rule 56(e). Thus, in the case of *Central Mexico Light & Power Co. v. Munch* (C. C. A. 2nd, 1940), 116 F. 2d 85, the court held that it was proper to consider affidavits in connection with a motion to dismiss whether the motion be deemed a motion to dismiss or one for summary judgment. The court stated:

“It is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion. Federal Rules 6(d), 12(b), 56(e); *Palmer v. Palmer*, D. C. Conn., 31 F. Supp. 861; 1 Moore’s Federal Practice 645, 647.”⁶

The rule laid down in these cases has been expressly included in the 1946 amendments to the Federal Rules of Civil Procedure, when there was added to Rule 12(b) the following sentence:

“If, on a motion asserting the defense numbered paragraph (6) to dismiss for failure of the pleading

⁶Accord: *Samara v. United States*, C. C. A. 2d (1942), 129 F. 2d 594; cert. den. 317 U. S. 686; *National War Labor Board v. Montgomery Ward, Inc.* (Court of Appeals for the District of Columbia, 1944), 144 F. 2d 528; *Kithcart v. Metropolitan Life Insurance Co.*, C. C. A. 8th (1945), 150 F. 2d 997.

to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

These amendments were adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2nd, 1947, and were, pursuant to the provisions of Rule 86(d), to take effect “on the day which is three months subsequent to the adjournment of the first regular session of the Eightieth Congress”; they have been held to have been effective since March 19, 1948. While the hearing and ruling in the instant case was prior to the effective date of the new amendments, the notes of the advisory committee make it clear that the amendment was merely a declaration of the recognized construction of the rule prior to its amendment, and the Supreme Court has stated that the notes of the advisory committee are of weight in connection with the construction of the rules promulgated by the committee.⁷ In the notes of the advisory committee under the 1946 amendment to subdivision (b) of Rule 12, reference is made to the decisions of the Second Circuit which were above cited, and states as follows:

“The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b) (6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such

⁷*Mississippi Publishing Corp. v. Murphee* (1946), 326 U. S. 438, 68 S. Ct. 242, 90 L. Ed. 185.

material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b) (6) is thus converted into a summary judgment motion, the amendment insures both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion."

In the present case the court below did in effect treat the motion to dismiss as a motion for summary judgment, and all the procedural requisites required by Rule 56 were complied with. Both parties had ample opportunity to file affidavits and counter-affidavits, and no contention has been made by appellant that it was denied any right to file any affidavits it desired.

3. APPELLANT MADE NO OBJECTION IN THE COURT BELOW TO THE USE OF AFFIDAVITS IN CONNECTION WITH THE MOTION TO DISMISS, AND MAY NOT MAKE THE OBJECTION FOR THE FIRST TIME ON APPEAL.

While appellant makes some point of the fact that appellees' affidavits were entitled "In opposition to the Motion for Preliminary Injunction and in support of the Motion to Dismiss," there is nothing in the record to show that appellant made any objections to these affidavits in the court below, although there was ample opportunity

to do so. Appellees' affidavits were filed and served upon appellant on October 17, 1947 [Tr. 26, 29]. Thereafter, appellant filed counter-affidavits, and no objection was made at that time [Tr. 31-33]. The Minute Order of the trial court was dated January 12, 1948 [Tr. 34], and the judgment of dismissal was not signed until February 3, 1948 [Tr. 50], after it had been approved as to form by counsel for appellant. The record is devoid of any objection whatsoever made by appellant between the time appellees' affidavits were filed on October 17, 1947, and the entry of judgment on February 4, 1948. Under these circumstances it would seem that appellant, without objection, permitted the court below to consider the affidavits in connection with the ruling on the motion to dismiss, and should not be allowed to complain on appeal of any alleged error which might have otherwise been prevented by appellant's timely objection.⁸

(b) There Is Nothing in the Record to Show That the Court Below Considered Any Documents Other Than Those Filed by Appellant.

Appellant's contention that the court erroneously considered affidavits in connection with its ruling on the motion for dismissal seems to be grounded upon the minute order of the court below, filed in this cause on January 12, 1948 [Tr. 34], providing as follows:

“From the complaint *and affidavits on file*, I cannot see the slightest possibility of a misleading or decep-

⁸*Monaghan v. Hill* (C. C. A. 9th), 140 F. 2d 31. In that case the court stated that the purpose of requiring an objection is so that the trial court may be informed of the supposed error in order to give it an opportunity to reconsider its ruling and to make any changes deemed advisable. See also 4th Cumulative Supplement to O'Brien's Manual of Federal Appellate Procedure (3rd Ed.), page 64.

tive statement in so far as the plaintiff's name or business is concerned, in either the name of the defendants, or the use by the defendants in their business of the words 'maternity,' 'mother,' 'mother-to-be,' 'motherhood' or the picture of a 'stork' or the picture of a clothed pregnant woman. Both the words and ideas back of them have been so long in the public domain, as well as the use of special clothing during pregnancy, *as to preclude relief under the plaintiff's complaint*, or the motion for temporary restraining order and the affidavits filed. Nor does the use of the word 'Lane' by the defendants indicate any basis for relief under plaintiff's complaint and *affidavits*. The motion for injunction is denied. The motion to dismiss is granted." (Emphasis added.)

We respectfully submit that a reading of the Minute Order does not indicate that the court considered any affidavits in connection with its ruling on the motion to dismiss. The phrase used in the opinion "as to preclude relief under the plaintiff's complaint" indicates that the court considered the complaint separately in connection with the motion to dismiss from the affidavits, which were considered with the motion for temporary restraining order, because immediately following that phrase the court added: "Or the motion for temporary restraining order and the affidavits filed."

Even if it be assumed that the court considered certain of the affidavits in connection with its ruling on the motion to dismiss, there is nothing in the record to indicate that the court considered any affidavits other than those

filed by appellant. As previously pointed out, appellant's affidavits contained samples of the allegedly pirated advertising material, so that the court examined said samples and determined for itself whether the conclusion stated in the complaint that the advertising material was similar was warranted. A reading of the Minute Order shows that this is just what the court did and concluded therefrom that there was not "the slightest possibility of a misleading or deceptive statement." Appellant should not be permitted to complain that the court considered its own affidavits and on the basis thereof granted a motion for summary judgment.

(c) On the Basis of the Complaint Alone, No Claim for Relief Is Stated.

On page 25 of its opening brief appellant states that the sole issue in connection with the ruling of the court below is "does the adoption of a name identical in part, dissimilar in part, and the use of similar advertising methods, with the purpose of causing confusion of goods and deception to the public, allow an injunction?" A restating of this issue as so phrased by appellant we think gives a full answer thereto. Does the adoption of the name "Maternity Lane" and the use of similar advertising methods, with the purpose of causing confusion of goods and deception to the public, allow an injunction to a business organized under the name "Lane-Bryant"? Very simply stated the question is: Is the name "Maternity Lane" in any way similar to the name "Lane-Bryant"? As stated by

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Judge Yankwich in his scholarly opinion in the case of *Brooks Bros. v. Brooks Clothing of California*, 60 Fed. Supp. 442, affirmed by this Court in 158 F. 2d at 798, cert. den. 328 U. S. 217:

“The ultimate issue in infringement cases is the likelihood that prospective purchasers will be misled.”
(60 Fed. Supp. at 450.)

The allegations in the complaint of the appellees’ bad faith must be considered in the light of the quoted rule, and whether or not appellees acted in bad faith the question as to whether or not the name “Maternity Lane” is similar to “Lane-Bryant” is the same, and this is a question of law. As stated by the California Supreme Court in *Scudder Food Products v. Ginsberg* (1943), 21 Cal. 2d 596, at 602:

“While it ordinarily is a question of fact as to whether two containers or labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be misled, in this case the dissimilarities are so palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be misled.”

The California Supreme Court affirmed the sustaining of a demurrer to the complaint, notwithstanding that the complaint contained allegations as follows:

“That defendants have imitated such distinctive and characteristic containers and packages together

with the labels and designs; . . . that plaintiff's mode of packing became associated in the mind of the public with plaintiff's goods and that except for the defendants' acts the public could have continued to easily and readily and without the necessity of close reading identified plaintiff's merchandise; that defendants' acts are for the express purpose of misleading the public; that the similarity in packages is such that the public are and have been misled." (21 Cal. 2d at 597.)

That complaint also alleged:

"That the acts stated are done with a fraudulent intent to injure and divert the business of the plaintiff and to deprive plaintiff of profits which would otherwise accrue." (21 Cal. 2d at 598.)

The language of the California Supreme Court would apply with equal force to the instant case—the dissimilarities between the names "Lane-Bryant" and "Maternity Lane" are so "palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be misled."

Counsel for appellant point to the similarity of advertising, and in their complaint they refer particularly to the use of script-type lettering and the phrase "mother-to-be" in connection with advertising the sale of maternity apparel. As stated by Judge Yankwich in his opinion in the *Brooks* case (60 Fed. Supp. at 457):

"The answer is obvious. Advertising follows a pattern. . . . As one reads the advertisements of

today, one is struck by the fact that the advertising writers have run out of adjectives and now fall into clichés. . . . And as language tends to run into a pattern, it is difficult, when speaking of similar things, to avoid the use of the same words, even in a language so rich as the English language. A phrase once seen by a writer of advertising copy may linger in the mind to such an extent that, *unconsciously*, he may use it in one of his own. Just as in one's writing, one may use phrases which have come from reading them in others' writing. Witness the currency of phrases like 'at long last' or 'blood, sweat and tears' after their use by famous personages."

In order to state a cause of action for unfair competition based upon similarity of names, it must be manifest to the court on inspection of the two names that the similarity as a whole would be likely to deceive ordinarily attentive and observing retail purchasers, or there must be proof of actual mistake by purchasers. (*American Brewing Co. v. Bicnville Brewery*, 153 Fed. 615.) In this case there are no allegations either in the complaint or in any of the affidavits filed by appellant that any members of the public have actually been misled, the contention being merely that the names are so similar that the public is likely to be misled. An examination of the cases relied upon by appellant shows that in every instance there was a marked similarity in the names involved and in each case the plaintiff was successful. The obvious distinction be-

tween those cases and this case is forcefully illustrated in graphic form:

<i>Name of Case</i>	<i>Name of Plaintiff</i>	<i>Name Complained Of</i>
<i>Weinstock, Lubin & Co. v. Marks</i> , 109 Cal. 529 (Cited on page 13 of Appellant's Brief)	Mechanics Store	Mechanical Store
<i>Modesto Creamery v. Stanislaus Etc. Co.</i> , 168 Cal. 289 (Cited on page 14 of Appellant's Brief)	Modesto	Modesto
<i>Banzahf v. Chase</i> , 150 Cal. 100 (Cited on page 16 of Appellant's Brief)	Old Homestead Bread	New Homestead Bread
<i>Eastern Columbia v. Waldman</i> , 30 Cal. 2d 268 (Cited on page 17 of Appellant's Brief)	Eastern Columbia	Western Columbia
<i>Academy of Motion Pictures v. Benson</i> , 15 Cal. 2d 685 (Cited on page 18 of Appellant's Brief)	Motion Picture Academy	The Hollywood Motion Picture Academy
<i>Carolina Pines v. Catalina Pines</i> , 128 Cal. App. 84 (Cited at page 18 of Appellant's Brief)	Carolina Pines	Catalina Pines
<i>Hoover Co. v. Groger</i> , 12 Cal. App. 2d 417 (Cited at page 18 of Appellant's Brief)	Hoover Company and Hoover Suction Sweeper Co.	Hoover Vacuum Cleaner Repairing
<i>Hoyt Heater Co. v. Hoyt</i> , 68 Cal. App. 2d 523 (Cited at page 19 of Appellant's Brief)	Hoyt Automatic Water Heater Company	Hoyt Automatic Water Heater Repair Service
<i>Physicians Electric Corp. v. Adams</i> , 79 Cal. App. 2d 550 (Cited at page 19 of Appellant's Brief)	Physicians Electric Service Corp.	Physicians Electronic Service Corp.
<i>Hainque v. Cyclops Iron Works</i> , 136 Cal. 351 (Cited at page 19 of Appellant's Brief)	Cyclops Machine Works	Cyclops Iron Works

It is obvious that if the following addition were made to this chart it would result in an anomaly:

<i>Name of Case</i>	<i>Name of Plaintiff</i>	<i>Name Complained Of</i>
<i>Lane-Bryant v. Maternity Lane</i>	Lane-Bryant	Maternity Lane

On page 14 of appellant's brief there is a quotation from the decision of the California Supreme Court in the case of *Italian Swiss Colony v. I. Vineyard Co.*, 158 Cal. 252, at 255, 256. We should like to add to the portion of the opinion quoted by appellant the sentence immediately following the quotation referred to by appellant:

"If the defendant can be shown to have put up his product with intent to palm it off as that of plaintiff, *and if it does in fact tend to mislead the purchasing public*, a case is made out, even though plaintiff has shown no exclusive right in any trademark or trade name." (Emphasis added.)

This sentence, particularly the portion which we have italicized, shows that in addition to bad faith it must be shown that the conduct complained of must "in fact tend to mislead the purchasing public."

This Court has recognized that in cases such as the present one, the crucial test is whether or not the public is likely to be deceived or misled. Thus in the case of *Lerner Stores Corp. v. Lerner* (C. C. A. 9th, 1947), 162 F. 2d 160, the plaintiff operated a chain of stores known as the "Lerner Shops" engaged in the sale at retail of ladies' clothing. The plaintiff was a corporation and had a store in San Francisco, and by this action sought to enjoin the defendant, one Wilfred Lerner, from using the word "Lerner" in connection with the name of his store in San Jose where he engaged in the sale at retail of ladies' clothing. The trial court gave judgment for the defendant, and in affirming that judgment this Court stated, as one of the basic questions for decision, the following (162 F. 2d at 162):

"Did the use of the name 'Lerner' by appellee lead the public to understand that his goods were the goods of appellant 'Lerner Shops'?"

In that case also the appellee was using his own name. While we do not contend that a person has an absolute right to use his own name in business, we do contend that that fact should be considered by any court called upon to enjoin the use of that name, particularly with reference to any allegations of bad faith. That is what this Court did in the *Lerner* case, and that is what the court below did in the instant case.

The *Lerner* case also provides a complete answer to appellant's contention in the instant case with respect to the partial similarity of names. The name "Wilfred Lerner" is certainly much more similar to the name "Lerner Shops" than is the name "Maternity Lane" to "Lane-Bryant." Surely in determining whether or not the names are similar regard must be given to the name as used. In the instant case there are no allegations in the complaint that either the appellant's or appellees' name was shortened to Lane or Lane's. The allegations are clear that the two parties were known by their customers simply as "Lane-Bryant" and "Maternity Lane" respectively. While the word "Lane" appears in each name, in each instance it is used in a different sense. In appellant's name the word "Lane" is used as a part of the name of an individual who originally opened the store subsequently acquired by appellant; the name "Maternity Lane" in no sense describes an individual. The word "Lane" is used in the name to describe a path or walk, and in no way even suggests the name of an individual.

If appellant's contention is valid, an individual having the name of Richard Hall who became established in business under that name could enjoin the use in a similar business of the names "Hall of Justice" or "Carnegie Hall."

The foregoing argument applies to any alleged cause of action for common law unfair competition, or for trademark infringement. The former is common law right, whereas the latter is purely statutory. The distinctions and similarities between the two are discussed in the decision of the District Court in *Brooks Bros. v. Brooks Clothing of California* (60 Fed. Supp. 442 at 447), and as stated by Judge Yankwich in the *Brooks* opinion (60 Fed. Supp. at 450):

“The ultimate issue in infringement cases is the likelihood that prospective purchasers will be misled. . . . The principle applies to unfair competition cases and to trademark cases, whether registered or unregistered.”

Conclusion.

The record in this case shows that appellant presented to the court below documentary evidence of the alleged unfairly competing or infringing advertising material, and that on the basis thereof the Court determined there was no right to a preliminary injunction. The Court also ruled that the appellees were entitled to judgment and, as we have shown, this ruling is proper either as a judgment on a motion for summary judgment or on a motion to dismiss, and we respectfully urge that both the order denying appellant's motion for preliminary injunction and the judgment of dismissal be affirmed.

Respectfully submitted,

H. MILES RASKOFF,
GENDEL & CHICHESTER,

Attorneys for Appellees.

No. 11940.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

REPLY BRIEF FOR APPELLANT.

HAROLD A. BLACK,

PHILIP K. VERLEGER,

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREEN,

704 Roosevelt Building, Los Angeles 14,

Attorneys for Appellant.

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TOPICAL INDEX

PAGE

I

Introduction	1
--------------------	---

II.

The complaint stated a cause of action.....	4
(a) Appellees' argument is that similarity of names is the sole test; and that similarity must be determined out of the context of conduct. This is unsound.....	4
(b) Under California law, conduct intended to deceive or conduct having a high probability of deception may be enjoined: similarity is evidentiary only on both these points	5
(c) The danger of confusion is apparent anyway.....	8
(d) Fraud, apart from California law, is well recognized as a major factor in authorizing an action for unfair competition	10

III.

A cause of action is stated for infringement of trade name as well as unfair competition.....	12
-----------------------------------------------------------------------------------------------	----

IV.

The trial by affidavit was improper.....	12
(a) The motion to dismiss was treated by the trial court as authorizing trial by affidavit.....	12
(b) It is error to consider affidavits upon a motion to dismiss on the merits.....	13

V.

The matter of the preliminary injunction.....	15
Conclusion	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abel v. Munro, 110 F. 2d 647.....	2
American Automobile Association v. American Automobile Owners Association, 216 Cal. 125, 13 P. 2d 707, 83 A. L. R. 699	6
Avrick v. Rockmont Envelope Co., 155 F. 2d 568.....	12, 16
Banzham v. Chase, 150 Cal. 180, 88 Pac. 704.....	10
Barnes v. Cahill, 56 Cal. App. 2d 780, 143 P. 2d 433.....	9
Cohen v. United States, 129 F. 2d 733.....	14
Dunston v. Los Angeles Van etc. Co., 165 Cal. 89, 131 Pac. 115	6
Galbreath v. Metropolitan Trust Co., 134 F. 2d 569.....	14
Italian-Swiss Colony v. I. Vineyard Co., 158 Cal. 252, 110 Pac. 913	6
Land v. Dollar, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 903....	13, 14
Lerner Stores Corp. v. Lerner, 162 F. 2d 160.....	3
Modesto Creamery v. Stanislaus etc. Co., 168 Cal. 289, 142 Pac. 845	5, 10
My-T Fine Corporation v. Samuels, 69 F. 2d 76.....	11
Polk Co. v. Glover, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6.....	13, 14
Refoule v. Ellis, 74 Fed. Supp. 336.....	14
Sarnoff v. Ciaglia, 165 F. 2d 167.....	14
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724	15
Scudder Food Products, Inc. v. Ginsberg, 21 Cal. 2d 596.....	7, 8
Southern Cal. F. Co. v. White Star C. Co., 45 Cal. App. 426....	8

TEXTBOOK

Restatement of the Law of Torts, Sec. 729.....	11
------------------------------------------------	----

No. 11940.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LANE BRYANT, INC.,

Appellant,

vs.

MATERNITY LANE LTD., OF CALIFORNIA, a corporation,
JACK LANE, JR., JANE LANE and LUCILLE LANE,

Appellees.

REPLY BRIEF FOR APPELLANT.

I.

Introduction.

We are concerned with a judgment dismissing (for failure to state a claim upon which relief can be granted) a complaint alleging an attempt to pass off appellees' goods as those of appellant. The method used, as set out in the complaint, was the adoption of the name "Maternity Lane," thus combining the word "Lane," a part of appellant's name, with the word "Maternity," which, in conjunction with "Lane Bryant," has been constantly used in appellant's advertising, and which is closely associated in the public mind with appellant. Other similarities of advertising phrases and script are alleged, and all are

alleged to have been the means of intentional deception. By this judgment appellant is denied the opportunity to place this conduct in its actual context, as can be done only by a trial, so that the truth and significance of appellant's allegations of fraud or, in the alternative, of probable confusion of the public, can be ascertained. No more drastic judgment can be imagined.

The reasons for a judgment which denies a party its day of trial should be very good. It has many times been observed, therefore, that on a motion for dismissal every inference is drawn in favor of the pleader. (*Abel v. Munro* (C. C. A. 2d), 110 F. 2d 647.) A litigant is not to be denied the opportunity to prove his case for any light or uncertain reason.

In their brief, appellees do not, as we might expect if clear reason existed for the dismissal, proceed promptly to state such reason. Appellees give primacy of place in their brief to the question whether the trial court properly denied an interlocutory injunction, a question which arises only if it be first assumed that the judgment of dismissal is incorrect. When appellees do approach the subject of the dismissal, appellees first defend the use of affidavits by the court, asserting various reasons why they might be considered, and second, argue that the complaint taken alone is inadequate, on the theory that appellant's allegations of fraud are immaterial, the advertising phrases in the public domain, and the only issue that of similarity of names, allegedly a pure question of law. But appellees' contention that the affidavits might be considered does not assist them, unless their second contention, that fraud is immaterial, is also sound. Appellant's pleadings and af-

fidavits contradict appellees' affidavit on this issue, and certainly therefore this issue would require trial. Even on motion for summary judgment, the court is not authorized to resolve conflicts between affidavits, or pleadings and affidavits, but must hold such issues for trial.

That there was an issue of fraud, and that it was material, is admitted by appellees in discussing the preliminary injunction. Thus, at page 12 they state:

"The issue of whether or not the appellees intended or attempted to pass themselves off as appellant was before the trial court in the form of contradictory affidavits filed by the respective parties."

And again at pages 13-14 appellees state:

" . . . While it is true that positive proof of bad faith is not necessary to establish a cause of action for unfair competition if the conduct complained of is likely to mislead and cause confusion among members of the public, the question of the defendant's good faith is an important issue upon a motion for preliminary injunction. Moreover, the recent decision of this Court in the case of *Lerner Stores Corp. v. Lerner*, 162 F. 2d 160, indicates that this Court placed great importance upon the acts of the defendant evidencing his good faith." (Citations omitted.)

Lerner Stores Corp. v. Lerner, supra, is concerned with the final judgment, and not a ruling on application for preliminary injunction. Nevertheless, when appellees were making these observations, they were discussing the preliminary injunction, and we assume that these remarks were intended to refer to the preliminary injunction only, since the last ten pages of appellees' brief deny

that fraud is material. This is, however, a hopeless inconsistency, for a preliminary injunction cannot be granted by reason of facts which do not give rise to any right at all to injunctive relief, and if fraud were material on the application for preliminary injunction, it was necessarily material on the motion to dismiss. There is, therefore, on this issue a fundamental conflict between pages 11 through 15 of appellees' brief, as opposed to pages 33 through 40 thereof. We shall attempt herein to vindicate appellees' noble beginning as opposed to their dismal termination.

II.

The Complaint Stated a Cause of Action.

(a) Appellees' Argument Is That Similarity of Names Is the Sole Test; and That Similarity Must Be Determined Out of the Context of Conduct. This Is Unsound.

Appellees' contention that the complaint states no cause of action is based on the proposition that the sole issue raised is: "Is the name 'Maternity Lane' in any way similar to 'Lane Bryant'?" (Appellees' Br. p. 33.) This, of course, is a complete reversal of the position taken by appellees on the application for preliminary injunction, where appellees treated the matter of similarity as merely evidentiary of bad faith, thus stating (Appellees' Br., p. 14): "Conversely, it would follow that where the facts indicate that a purchaser, exercising ordinary care, would not be likely to be deceived, it may be assumed that the defendant has not acted in bad faith." In so reversing their position, appellees apparently contend that the names alone must be considered, without reference to the context of conduct,—the similarity of advertising, and the other

significant circumstances. (See Appellees' Br. pp. 17, 36.) But similarity is only one aspect of the prime alternative questions of fraud and danger of deception; and in determining these questions *all* of appellees' conduct may be considered.

(b) Under California Law, Conduct Intended to Deceive or Conduct Having a High Probability of Deception May Be Enjoined; Similarity Is Evidentiary Only on Both These Points.

The California cases, which all parties concede are binding on the unfair competition phase of this case, have many times allowed relief on the basis of allegations of fraud, and have explicitly stated that fraud is the essence of a cause of action for unfair competition. (See the authorities cited on pages 13 through 16 of appellant's opening brief.)

In *Modesto Creamery v. Stanislaus etc. Co.*, 168 Cal. 289, 293; 142 Pac. 845, 846:

" . . . The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law of regulating trademarks or of the ownership of such trademark by the plaintiffs. *The gist of such an action is not the appropriation and use of another's trademark, but the fraudulent injury to and appropriation of another's trade.*" (Emphasis added.)

This quotation is expanded more fully at pages 15 and 16 of appellant's opening brief.

So far as this branch of law is concerned, not only is it incorrect to say that similarity is the issue (for the cases

explicitly state that fraud is the issue), but the cases have flatly held that similarity alone does not support an action where fraud is absent.

Dunston v. Los Angeles Van etc. Co., 165 Cal. 89;
American Automobile Assn. v. American Automobile Owners Assn., 216 Cal. 125; 13 P. 2d 707.

In respect to the many cases holding fraud to be the issue, cited at pages 11 through 22 of appellant's opening brief, appellees have had naught to say, save to tabulate the names involved in those cases and to argue that the similarity in those cases was greater than the similarity here. But the decisions of the state courts are entitled to respect with regard to the rule they state, as well as to the facts on which they rule. Those cases state without equivocation that fraud is the primary basis for relief.

From one of those cases only, *Italian-Swiss Colony v. I. Vineyard Co.*, 158 Cal. 252, 256; 110 Pac. 913 (at page 38 of their brief) appellees have quoted a paragraph to the effect that if intent to deceive, and deception in fact is proved, a case is made out, which appellees suggest supports their contention that the degree of similarity is the only issue. As we read that case, it states two alternative bases for relief—that of fraud, and that of danger of deception, for prior to the language quoted by appellees there appears the language appellant has quoted, that "There must be the intent to deceive, *or* at least the doing of things reasonably likely to deceive."

Degree of similarity can hardly be the only test when, as we have seen, the later cases plainly hold that similarity in itself gives no basis for relief.

The single California case on which appellees rely (it must always be remembered that the unfair competition phase of the case is to be decided by California law), *Scudder v. Ginsberg*, 21 Cal. 2d 596, is not in point. As appears from the following initial statement of the court in that case, the problem with which we are concerned was not present (pp. 598, 599):

“Before proceeding further it should be noted that the foregoing pleading does not even purport to allege that either party had a trademark nor that a trademark has been infringed. *Sun-Maid Raisin Growers v. Mosesian*, 84 Cal. App. 485 (258 P. 630), and cases there cited, need not be discussed. Nor is it claimed that the trade name of a store or the proprietor has been pirated. It is therefore patent that *American Automobile Assn. v. American Automobile O. Assn.*, 216 Cal. 125 (13 P. 2d, 707, 83 A. L. R. 699), and cases there cited, need not be dwelt upon. Nor is any attempt made by the plaintiff to allege that it was the first in the field of action to use a specific trade name and had built up an established trade thereunder and that the defendants were newcomers who have attempted, and are now attempting, to pirate the plaintiff's trade name and established trade. It follows that the case entitled *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529 (42 P. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182), is not necessarily controlling.”

The significance of this paragraph, distinguishing all cases involving pirating of trade names is this: In the cases involving simply allegations of simulation of labels, like the *Scudder* case, the California courts have often confined themselves rather strictly to considering alone

whether the resemblance between the labels is such as to cause confusion. (See *Scudder v. Ginsberg*, *supra*, and the cases therein cited, particularly, *So. Cal. F. Co. v. White Star C. Co.*, 45 Cal. App. 426.) But, on the other hand, where piracy by the use of trade names and related conduct is concerned, the courts, instead of confining themselves to considering similarity alone, have held that similarity alone is insufficient and is merely evidentiary on the fundamental question of fraud. The cases we have cited before are clear on this proposition. The *Scudder* case, as we have said, is therefore, not in point.

(c) The Danger of Confusion Is Apparent Anyway.

As we have pointed out, mere similarity of names in this state does not support a cause of action: it is the use of the names as the means of fraud that counts. It is also true, however, as we have pointed out at pages 25 through 28 of appellant's opening brief, that California Courts will allow relief alternatively if there is a similarity of names such as would probably cause confusion by the "*ordinary unsuspecting person*." There the ultimate fact is the danger of confusion, not the fraud.

In a prominent portion of the names of both appellant and appellees is the word "Lane." Appellees attempt to avoid the significance of this fact by pointing out that although "Lane" is the name of the organizers of appellees' business, it is used in the sense of a place rather than as part of a name. The difficulty with this argument is that it is coupled with "Maternity," a word describing the type of goods carried, not a place, and the word "Maternity" is used likewise in connection with appellant's

line of goods and in connection with appellant's name. More than that, other phrases, such as the phrase "Mothers-to-be," are used by both appellant and appellees. Under these circumstances, we do not see how it can be said that there is no danger of confusion from the combination of the name and the other factors. The language of the court in the case of *Barnes v. Cahill*, 56 Cal App. 2d 780, at 783, 784; 143 P. 2d 433, is directly in point:

" . . . Defendant's mat was entitled 'This Week in Hollywood' while that of plaintiffs bore the title 'Hollywood Today,' but undoubtedly the word 'Hollywood' is the important part of each. An entire identity in the wording of a defendant's packages, wrappers, labels and titles with those of a plaintiff is not necessary to bring this rule of law into play. See *Modesto Creamery v. Stanislaus etc. Co.* (1914), 168 Cal. 289, 294 (142 P. 845). The trial court found, in the case at bar, that the use by defendant of the title 'This Week in Hollywood' would not tend to deceive or mislead plaintiffs' customers. Plaintiffs contend that this finding is not supported by the evidence. We need not so hold because a reversal is necessary for other reasons. At least, a finding the other way would have been well supported."

It is surely true that "Lane" is a prominent part of both the names in our case. In point of fact, the resemblances of the names, taken in context, in *Barnes v. Cahill*, *supra*, were far less than they are in this case.

Appellees say very little about the effect of the combination of the word "Maternity," the phrase "Mothers-to-be," and the similarity of script. As nearly as we can

make out (though the matter is discussed only in connection with the preliminary injunction), appellees' basis for ignoring these factors is that the word "Maternity," the phrase "Mothers-to-be," and the phrase "Expectant Mother" are not capable of exclusive appropriation, and are within the public domain.

However, in *Modesto Creamery v. Stanislaus etc. Co.* (1914), 168 Cal. 289, 142 Pac. 845, and *Banzhaf v. Chase*, 150 Cal. 180, 88 Pac. 704, the Supreme Court of California held squarely that the use of words or phrases which were not capable of exclusive appropriation, and were in the public domain, with the intention of causing confusion and deception, could be enjoined. Such intention is alleged in this case, and the fact that these words and phrases were in the public domain is therefore wholly irrelevant. That this factor was relied upon by the lower court, in denying appellant the right of a trial, is merely another reason why the judgment should be reversed.

(d) Fraud, Apart From California Law, Is Well Recognized as a Major Factor in Authorizing an Action for Unfair Competition.

In this state fraud has been made the touchstone in most unfair competition actions. The formulation of the rule may differ slightly, but the rule is the same generally. The intent on the part of the defendant (obviously a question of fact to be proved upon a trial) is everywhere recognized as a major issue in cases of this sort.

Thus, in the *Restatement of Torts*, Section 729, Comment *f*, it is said:

“Intent of actor. As stated in section 717, one may infringe another’s trade-mark or trade name by adopting a confusingly similar designation whether he does so innocently or for the purpose of deceiving prospective purchasers. But his knowledge or purpose is an important factor in determining whether or not his designation is confusingly similar. If he adopts the designation in ignorance of the other’s trade-mark or trade name, the similarity is determined on the basis of other factors. *But if he adopts his designation with the intent of deriving benefit from the reputation of the trade-mark or trade name, his intent may be sufficient to justify the inference that there is confusing similarity. Since he was and is intimately concerned with the probable reaction in the market, his judgment manifested prior to the controversy, is highly persuasive.* His denial that his conduct is likely to achieve the result intended by him will ordinarily carry little weight. While the actor’s intention is thus a factor in determining the likelihood of confusion, the degree of similarity in appearance, pronunciation or suggestion (see Comments *b* to *e*) is a factor in determining the actor’s intention when that is in issue.” (Emphasis added.)

The very similar language in Judge Hand’s opinion in *My-T Fine Corporation v. Samuels* (C. C. A. 2), 69 F. 2d 76, at 77, is quoted at page 23 of appellant’s opening brief.

III.

A Cause of Action Is Stated for Infringement of Trade Name as Well as Unfair Competition.

At pages 30 through 36 of appellant's opening brief, we collected authorities indicating that the complaint stated a cause of action for trademark infringement. Appellees have had nothing to say about these authorities save to state that the problem of trademark infringement is the same as that of unfair competition. But the trademark question is governed by federal law, which is that summary disposition of this sort of case is not proper.

Avrick v. Rockmont Envelope Co. (C. C. A. 10th),
155 F. 2d 568.

IV.

The Trial by Affidavit Was Improper.

(a) The Motion to Dismiss Was Treated by the Trial Court as Authorizing Trial by Affidavit.

Appellees have suggested (Appellees' Br. p. 32) that only the sufficiency of the complaint, or the complaint plus *our* affidavits, was considered on the motion to dismiss. But the judgment of dismissal [Tr. 50] reads as follows:

"The cause came on regularly to be heard upon defendants' motion that the same be dismissed on the ground that the complaint filed herein failed to state a claim against defendants upon which relief can be granted. *The Court, having duly heard and considered the affidavits, proofs, papers and arguments of the parties respectively, granted the motion.*" (Emphasis added.)

This seems conclusive to us.

It has been suggested that the record shows no objection at the trial to the consideration of the affidavits. But it has never been the rule that argument of counsel must be made a part of the record upon an appeal. It is not contended that there was any stipulation submitting the motion to dismiss on affidavits. Unless there is affirmative evidence of waiver, it is our understanding that any legal argument properly applicable may be made on an appeal from a judgment dismissing a complaint for failure to state a claim.

(b) It Is Error to Consider Affidavits Upon a Motion to Dismiss On the Merits.

We have relied on *Polk Co. v. Glover*, 305 U. S. 5; 59 S. Ct. 15, 83 L. Ed. 6; and *Land v. Dollar*, 330 U. S. 731; 67 S. Ct. 1009; both of which explicitly state that affidavits may not be considered upon a motion to dismiss on the merits. Counsel makes as a point that *Land v. Dollar*, *supra*, also states that affidavits may be considered on a motion raising a jurisdictional question. Counsel, however, omits to point to any such question involved in this case, and we know of none.

Counsel distinguishes as *dicta* the statement in *Land v. Dollar*, *supra*, that “. . . the facts set forth in the complaint are assumed to be true and affidavits . . . may not be considered,” and objects that the statement appears in a footnote.

The statement is not *dicta*. In that case the District Court had before it a motion to dismiss and an application for injunction supported and opposed by affidavits. The motion to dismiss was granted. On review, the Supreme Court had before it and considered the question whether

the affidavits should be considered in support of the judgment of dismissal. It held that they could not, and the footnote statement directly supports the ruling. We do not see that the ruling is any the less binding, because the reasons are stated in a footnote.

Counsel seek to escape *Polk Co. v. Glover, supra*, by arguing that it was decided under the old equity rules, which allowed a motion to dismiss for “defense in point of law arising upon the face of the bill,” whereas the present rule (12b) allows a motion upon various defenses of law and fact including “*failure to state a claim.*” If that distinction is to have merit as permitting the use of affidavits, it must be true that whether plaintiff *states* a claim is determined by the *statements* in defendant’s affidavits. Defendant’s affidavit does not shed light on whether plaintiff has *stated* a claim: all it can do is indicate that defendant does not think that plaintiff *has* a *claim*—a very different thing. *Polk Co. v. Glover* was followed by the Supreme Court in *Land v. Dollar, supra* (also in *Cohen v. U. S.* (C. C. A. 8th), 129 F. 2d 733; *Galbreath v. Metropolitan Trust Co.* (C. C. A. 10th), 134 F. 2d 569; *Refoule v. Ellis* (N. D., Ga.), 74 F. Supp. 336; among other cases). We think it must be concluded that it is still good law.

In view of the existence of these two square Supreme Court decisions, we hesitate even to mention the accumulation of cases in the circuit courts of appeals, cited by appellees to the contrary. But they are harmless to us. All of them are cases where some fact of a jurisdictional nature, or of a preliminary nature, was established by uncontested affidavits. None of them permits a district

court to weigh conflicting affidavits, and to decide the merits of a case without trial. At the most, they permit a district court to do on motion for dismissal what may be done on motion for summary judgment; and, of course, the appearance of a contested issue of fact precludes summary judgment. (*Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724; *Sarnoff v. Ciaglia* (C. C. A. 3d), 165 F. 2d 167.)

Counsel suggests, on the strength of a rule not in effect when the cause was heard, that the motion should be treated as a motion for summary judgment. But, since the affidavits were conflicting, summary judgment could not be granted. The existence of the procedure for summary judgment does not reinstate the equity practice of medieval England, whereby all testimony was always taken by affidavit or deposition.

V.

The Matter of the Preliminary Injunction.

We were perhaps over lengthy in dealing with the preliminary injunction phase of the case, for our argument does not seem to have been followed by counsel. We assert as to it: (1) that the granting of a motion to dismiss necessarily includes denial of a preliminary injunction; (2) that therefore, the purported separate ruling on the availability of preliminary injunction was a mere refusal of that which could not be given,—in itself a nullity. Or, to put the matter differently, the court in deciding that it must dismiss, must have decided that it had no discretion to grant the preliminary injunction, and cannot therefore have exercised discretion in refusing it. If we are correct in urging error in the dismissal, we

believe that, since the ruling on the injunction was necessarily included in the dismissal, it should be reversed with it, so that the trial court may exercise its discretion in the correct legal light.

Conclusion.

By way of conclusion, we do not believe we can do better than again quote the words of the Tenth Circuit Court in *Avrick v. Rockmont Envelope Co.*, 155 F. 2d 568 at p. 573, as follows:

“While from a comparison of the two specimens side by side we think there is little likelihood that the ordinary purchaser, while exercising due care and caution, would be misled and deceived into accepting ‘Sky Mail’ as and for ‘Sky-Rite,’ we doubt the propriety of summarily deciding that question as a matter of law on this record. An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one’s fundamental right to his full day in court. In cases of this kind where no single factor controls the equation, and the court is necessarily required to resolve the question of alleged intent in arriving at its judgment, we are of the opinion that justice can best be served by a trial of the question on its merits.”

Respectfully submitted,

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GRIFFITHS & GREEN,

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No. 11941

United States
Circuit Court of Appeals
for the Ninth Circuit

HARRY V. SOANES,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
FRANK O. BELL,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
LUTHER E. GIBSON,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
VALLEJO BUS COMPANY (a dissolved Cali-
fornia Corporation),
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AUG 10 1948
Transcript of Record
PAUL P. O'BRIEN,
CLERK

Upon Petitions to Review Decisions of The Tax Court
of the United States

No. 11941

United States

Circuit Court of Appeals

for the Ninth Circuit

HARRY V. SOANES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
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FRANK O. BELL,

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Upon Petitions to Review Decisions of The Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Answer No. 11046 13

Appearances No. 11046 1

Certificate of Clerk to Transcript of Record.... 68

Decisions:

No. 11043 58

No. 11044 59

No. 11045 60

No. 11046 61

Designation of Record, Statement of Points and
(CCA) 72

Docket Entries No. 11046..... 1

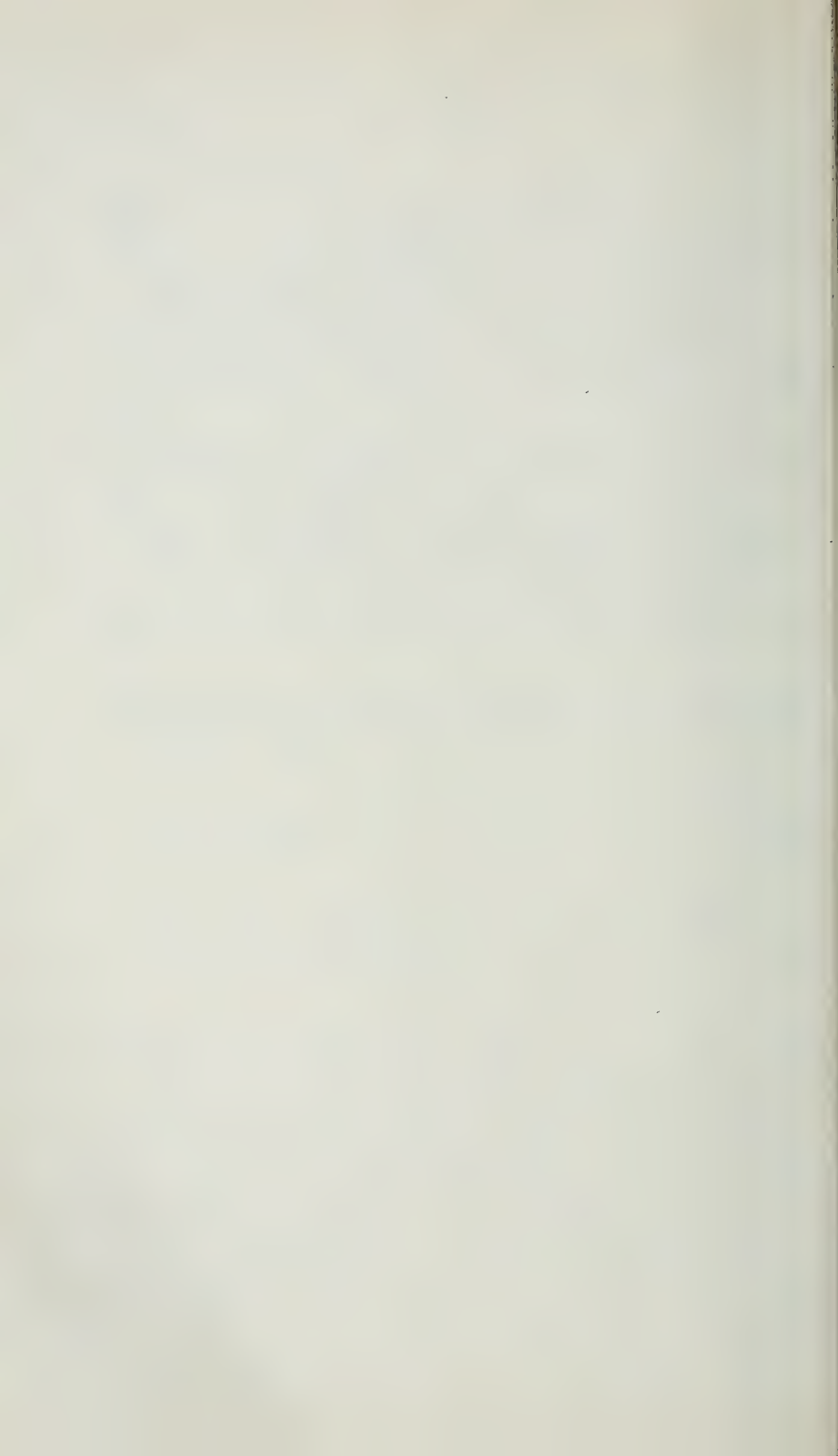
Exhibits for Petitioner:

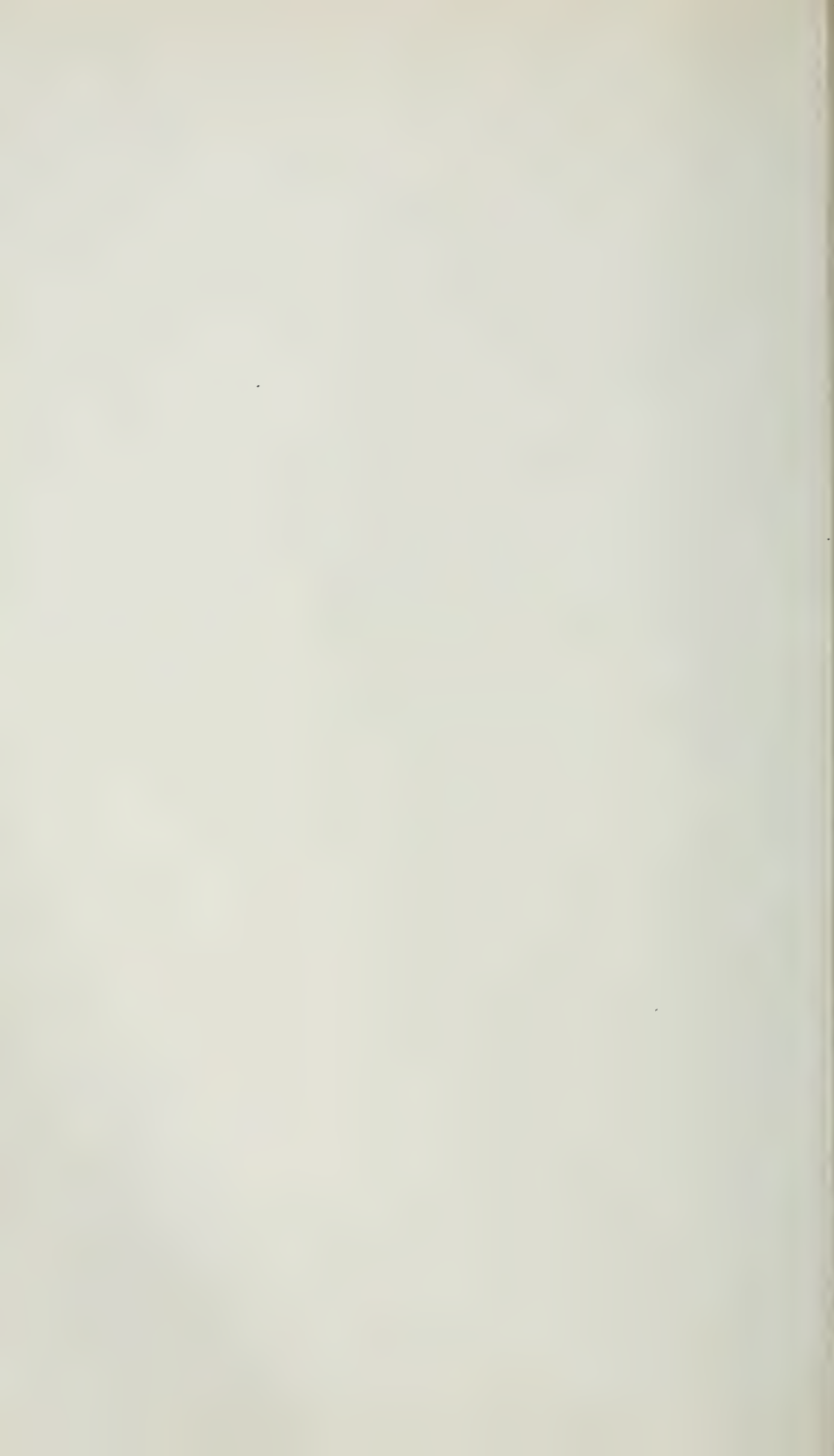
1—Decision in Case No. 4672 before the Rail-
road Commission of the State of California 35

2—(Excerpts) Letter dated March 1, 1943,
Homer H. Grant, Transportation Research
Engineer, to Warren K. Brown, Director
of Transportation, and J. G. Hunter, As-
sistant Director; Excerpts from Report... 44

	PAGE
Findings of Fact and Opinion.....	49
Motion for Consolidation of Cases for Hearing (CCA)	70
Opinion (Nos. 11046, 11043, 11044, 11045).....	50
Petition for Redetermination of Deficiency No. 11046	3
Exhibit A—Notice of Deficiency.....	7
Petition for Review, No. 11046.....	61
Notice of Filing	63
Statement of Points Relied Upon by Vallejo Bus Co. (USTC)	64
Statement of Points Relied Upon and Designa- tion of Record (CCA)	72
Stipulation of Facts, No. 11046.....	15
Exhibit 1—Agreement of Partnership, Novem- ber 12, 1942, between Luther E. Gibson, Harry V. Soanes and Frank O. Bell.....	20
Exhibit 2—Minutes of Special Meeting of the Board of Directors of the Vallejo Bus Co., May 19, 1942	23

	PAGE
Stipulation of Facts—(Continued)	
Exhibit 3—Agreement, June 9, 1942, by and between Vallejo Bus Co., Seller, and Luther E. Gibson, Harry V. Soanes and Frank O. Bell, Buyers	26
Exhibit 4—Petition of Vallejo Bus Co. to Ap- prove Sale and Transfer of Assets.....	28
Exhibit 5—Order Granting Application and Authorizing Transfer of Assets described in agreement dated June 9, 1942.....	33
Stipulation re Printing of Record, etc. (CCA)..	74





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Docket No. 11046

VALLEJO BUS COMPANY (a dissolved
California corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

May 27—Petition received and filed. Taxpayer notified. Fee paid.

Jun. 3—Copy of petition served on General Counsel.

May 31—Request for hearing at San Francisco, filed by taxpayer. 6/5/46 Granted.

July 3—Answer filed by General Counsel.

July 12—Notice issued placing Proceeding on San Francisco calendar. Service of answer made.

1947

Mar. 28—Hearing set May 26, 1947, at San Francisco, California.

May 26—Hearing had before Judge Johnson on merits. Oral motion of petitioner to con-

1947

solidate with 11043, 11044 and 11045—
Motion granted. Stipulation of facts filed.
Petitioner's brief 6/25/47. Respondent's
brief 7/25/47. Petitioner's reply brief
8/14/47.

Jun. 16—Transcript of hearing 5/26/47 filed.

Jun. 23—Brief filed by taxpayer. Copy served.

July 24—Reply brief filed by General Counsel.
Copy served.

Aug. 11—Reply brief filed by taxpayer. 8/12/47
Copy served.

1948

Jan. 23—Opinion rendered, Judge Johnson. De-
cision will be entered for the respondent.
Copy served.

Jan. 27—Decision entered. Judge Johnson. Div. 5.

Apr. 26—Petition for review by U. S. Circuit
Court of Appeals, 9th Circuit, filed by
taxpayer.

Apr. 26—Statement of points relied upon filed by
taxpayer.

Apr. 27—Notice of filing petition for review and
proof of service thereon filed.

Apr. 27—Acknowledgment of service of statement
of points filed by General Counsel.

May 4—Designation of record filed by taxpayer.

May 6—Agreed designation of contents of record
filed by taxpayer with proof of service
thereon. [4*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

The Tax Court of the United States

Docket No. 11046

THE VALLEJO BUS COMPANY (a dissolved
California corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiencies for the calendar year 1942 set forth by the Commissioner of Internal Revenue in his notice of deficiency (San Francisco-IRA: 90D-RR (C:TS: PD-SF: WGW)) dated March 5, 1946, and as a basis of its proceeding alleges as follows:

1. Petitioner was a California corporation but was duly dissolved under the laws of the State of California on December 31, 1942, and this petition is filed and prosecuted in the name and on behalf of said corporation by the officers and directors thereof at the time of its dissolution. The principal office of said petitioner is 316 Napa Street, Vallejo, California. The return for the period here involved was filed with the Collector of Internal Revenue for the First District of California. [52]

2. The notice of deficiencies (a copy of which is attached hereto and marked "Exhibit A") was mailed to petitioner on March 5, 1946.

3. The taxes in controversy are income tax, declared value excess profits tax, and excess profits tax for the calendar year 1942 and in the amount of \$30,452.44.

4. The determination of tax set forth in said notice of deficiencies is based upon the following error:

(a) The Commissioner erred in including as taxable income of petitioner the revenue of certain bus lines during the period from June 1, 1942 to September 15, 1942.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner was incorporated under the laws of the State of California on July 3, 1936. Petitioner's principal business was the operation of certain bus lines in the City of Vallejo, California, and adjoining territory, and petitioner continued to operate said lines until the sale thereof hereinafter set forth.

(b) On May 19, 1942, petitioner's three stockholders as co-partners, doing business under the firm name and style of Vallejo Bus Co., offered to purchase from petitioner the operative rights of the corporation and all its assets, except four Reo buses, for the sum of \$29,937.20. At a special meeting of the Board of Directors of petitioner held [53] on that day this offer was accepted, the sale and transfer to become effective as of June 1, 1942, subject to the approval of the Railroad Commis-

sion of the State of California. At the same time the officers of the corporation were authorized to execute and deliver the necessary documents.

(c) Said partnership took over the operation of the business on or about June 4, 1942, but prior thereto and on June 1, 1942, said partnership opened a bank account in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of the business, including those received on and after June 1, 1942, were deposited in said bank account.

(d) On June 9, 1942, petitioner filed a petition with the Railroad Commission of the State of California requesting the Commission to approve the sale and transfer aforesaid.

(e) On September 15, 1942, the Railroad Commission issued its order granting the application of petitioner and authorizing the transfer of the properties described in the agreement, said transfer to take place on or before December 31, 1942.

(f) The Commissioner erroneously added to petitioner's taxable income for the calendar year 1942 the sum of \$35,550.17, alleged to be the revenue from the aforesaid [54] bus lines for the period from June 1, 1942 to September 15, 1942.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is an overassessment of income tax for the calendar year 1942 in the amount of \$2.03, that there is no

deficiency in declared value excess profits tax and that the deficiency in excess profits tax does not exceed the sum of \$344.26.

/s/ LEON DE FREMERY,
/s/ CLARENCE E. MUSTO,
Counsel for Petitioner. [55]

State of California,
County of Solano—ss.

Frank O. Bell, being duly sworn, says that he was Secretary and a Director of petitioner above named on the date of its dissolution and as such is duly authorized to verify the foregoing petition on behalf of said dissolved corporation; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, that the statements contained therein are true, except those stated to be upon information and belief, and those he believes to be true.

FRANK O. BELL

Subscribed and sworn to before me this 24th day of May, 1946.

(Seal) GEORGE C. DEMMON,
Notary Public. [56]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Mar. 5, 1946

Office of Internal Revenue Agent in Charge
San Francisco Division
IRA:90-D-RR
(C:TS:PD
SF:WGW)

The Vallejo Bus Company
316 Napa Street
Vallejo, California

Gentlemen:

You are advised that the determination of your declared value excess-profits tax liability for the taxable year ended December 31, 1942 discloses a deficiency of \$3,074.94 and that the determination of your excess profits tax liability for the taxable year ended December 31, 1942, discloses a deficiency of \$27,721.76 and that the determination of your income tax liability for the taxable year ended December 31, 1942, discloses an overassessment of \$2.03 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By /s/ F. M. HARLESS,

Internal Revenue Agent in Charge.

Enclosures: Statement, Form of Waiver, Claim Form 843. [57]

STATEMENT

San Francisco
 IRA :90-D-RR
 (C:TS:PD
 SF:WGW)

The Vallejo Bus Company
 316 Napa Street
 Vallejo, California

Tax Liability for the Taxable Year Ended December 31, 1942

	Liability	Assessed	Over- assessment	Deficiency
Income Tax	\$ 1,543.27	\$ 1,545.30	\$2.03	
Declared value excess profits tax	3,074.94	0.00		\$ 3,074.94
Excess profits tax	44,732.63	17,010.87		27,721.76

In making this determination of your tax liability, careful consideration has been given to your protest received October 19, 1944, and to the statements made at the conference held on November 17, 1944, and May 9, 1945.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Leon de Fremery, 11th Floor, Crocker Building, San Francisco 4, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office. [58]

ADJUSTMENTS TO NET INCOME

Net income for declared value excess-profits tax computation as disclosed by return.....	\$24,994.65
Unallowable deductions and additional income:	
(a) Income not reported	\$35,550.17
(b) Capital stock tax	375.00
	<hr/>
Net income for declared value excess-profits tax computation as adjusted	\$60,919.82

EXPLANATION OF ADJUSTMENTS

(a) You contend that on or about June 1, 1942, you made a transfer of nearly all of your properties and a transfer of your operative rights, created by decisions of the Railroad Commission of the State of California, to a partnership composed of per-

sons who were also your shareholders, and that the earnings from said properties from said date are not taxable to you. It is held that the transfer was not effective until the Railroad Commission authorized the transfer in its order dated September 15, 1942, and as a consequence the earnings from said properties up to September 15, 1942, are includible in your income. Accordingly, the income as reported by you is increased in the amount of \$35,550.17.

Net income to August 31, 1942.....	\$55,603.01
Net income September 1, 1942, to September 15, 1942	4,941.81
Total	<u>\$60,544.82</u>
Amount reported on the return.....	24,994.65
Additional income	<u>\$35,550.17</u>

(b) Deduction of \$375.00 for capital stock tax paid during the taxable year is disallowed. The tax was paid on your capital stock tax return for the capital stock tax year ended June 30, 1942, which tax accrued on July 1, 1941. The capital stock tax is, therefore, not a proper accrual for the year 1942.

(c) In the computation of income tax, credit for income subject to excess profits tax is allowed in the amount of \$51,758.71 in lieu of the amount of \$18,900.97 shown on the return. [59]

COMPUTATION OF DECLARED VALUE EXCESS-PROFITS TAX

Net income for declared value excess-profits tax computation	\$60,919.82
Less:	
10 percent of \$300,999.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1942.....	<u>30,099.90</u>
Balance subject to declared value excess-profits tax....	\$30,819.92
Less:	
5 percent of declared value of capital stock.....	<u>15,049.95</u>
Balance	<u>\$15,769.97</u>
Amount taxable at 6.6 percent \$15,049.95, and tax.....	\$ 993.30
Balance taxable at 13.2 percent \$15,769.97, and tax....	<u>2,081.64</u>
Total declared value excess-profits tax assessable.....	\$ 3,074.94
Declared value excess-profits tax assessed:	
Original, Account No. 66848—First California District	<u>0.00</u>
Deficiency of declared value excess-profits tax.....	\$ 3,074.94

COMPUTATION OF INCOME TAX

Net income for declared value excess-profits tax computation	\$60,919.82
Less: Declared value excess-profits tax.....	3,074.94
Net income for capital stock tax purposes.....	\$57,844.88
Less: (c) Income subject to excess profits tax.....	51,758.71
Normal-tax net income	\$ 6,086.17

NORMAL TAX COMPUTATION

Normal-tax net income.....	\$6,086.17
Tax at 15 percent on.....\$5,000.00	\$ 750.00
Tax at 17 percent on.....1,086.17	184.65
Total normal tax.....	\$ 934.65

SURTAX COMPUTATION

Surtax net income	\$6,086.17
Surtax at 10 percent on \$6,086.17.....	608.62
Total income tax assessable.....	\$ 1,543.27

Income tax assessed:

Original, Account No. 66848—First California District	1,545.30
-------------------------------------------------------------	----------

Overassessment of income tax.....	\$ 2.03
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ADJUSTMENTS TO EXCESS PROFITS NET INCOME AS
COMPUTED UNDER THE INVESTED CAPITAL
CREDIT METHOD

Excess profits net income as disclosed by return.....	\$25,140.63
Additions: (a) Increase in net income.....	35,925.17
Total	\$61,065.80
Deductions: (b) Declared value excess-profits tax.....	3,074.94
Excess profits net income as revised.....	\$57,990.86

EXPLANATION OF ADJUSTMENTS

(a) The increase in net income is explained in the foregoing and consists of the following items:

Income not reported	\$35,550.17
Capital stock tax disallowed.....	375.00
Total	<u>\$35,925.17</u>

(b) Excess profits net income is reduced by declared value excess-profits tax of \$3,074.94 as determined herein.

ADJUSTMENTS TO EXCESS PROFITS CREDIT BASED
ON INVESTED CAPITAL

	As disclosed by return (Deductions)	Corrected
INVESTED CAPITAL		
Equity invested capital beginning of year	\$12,675.17 (a) (\$93.85)	\$12,581.32
Add: 50 percent of average borrowed capital	2,820.55	2,820.55
Invested capital	<u>\$15,495.72</u>	<u>\$15,401.87</u>
Excess Profits Credit—8%	1,239.66	1,232.15

EXPLANATION OF ADJUSTMENTS

(a) Accumulated earnings and profits as of January 1, 1942, are decreased by \$93.85, due to the following adjustments:

Decrease—capital stock tax accrued in 1941.....	\$187.50
Increase—overstatement of accrual of 1941 taxes:	
Income tax	\$28.03
Excess profits tax	65.62
Net decrease	<u>\$93.85</u>

[62]

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$57,990.86
Less:	
Specific exemption	\$5,000.00
Excess profits credit	1,232.15
Adjusted excess profits net income.....	<u>\$51,758.71</u>
90 percent thereof	<u>\$46,582.84</u>

Surtax net income (computed without regard
to credit provided by section 26(e)).....\$57,844.88

80 percent thereof\$46,275.90

Less:

Income tax under Chapter I (other than
section 102) for the taxable year..... 1,543.27

Balance\$44,732.63

Excess profits tax:

Above balance, or 90 percent of adjusted excess profits
net income, whichever is the lesser amount.....\$44,732.63

Excess profits tax assessable.....\$44,732.63

Excess profits tax assessed:

Original, April 1943 list, Account No. 400306—First
California District 17,010.87

Deficiency of excess profits tax.....\$27,721.76

POST-WAR REFUND OF EXCESS PROFITS TAX AND
CREDIT FOR DEBT RETIREMENT

	Return	Corrected
Excess profits tax	\$17,010.87	\$44,732.63

Credit allowable under sections 780 and 781	1,701.09	4,473.26
------------------------------------------------------	----------	----------

Net reduction in indebtedness under
section 783—none claimed

Credit for debt retirement allowable.....	0.00	0.00
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Net post-war refund credit.....	\$ 1,701.09	\$ 4,473.26
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[Endorsed]: Filed May 27, 1946. [63]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the

above-named petitioner admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits the taxes in controversy are declared value excess profits taxes and excess profits taxes for the calendar year 1942, and alleges the amount to be \$30,796.70, but denies the remaining allegations contained in paragraph 3 of the petition.

4 and 4(a). Denies that the Commissioner erred in the determination of the deficiencies as alleged in paragraph 4 and subparagraph (a) thereunder.

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition; alleges the petitioner was an active, operating public utility under the jurisdiction of the California State Railroad Commission and held a certificate of necessity issued by that body dated May 6, 1941.

5(b). Admits the allegations contained in the first sentence of subparagraph (b) of paragraph 5 of the petition, but denies the remaining allegations contained in said subparagraph.

5(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

5(d). Admits that on June 9, 1942, petitioner filed a petition with the Railroad Commission of the State of California requesting the Commission to approve a sale and transfer of its assets; denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition

5(e). Admits the allegations contained in sub-

paragraph (e) of paragraph 5 of the petition.

5(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied. [65]

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL, TMM
Of Counsel:

B. H. NEBLETT,
Division Counsel;

T. H. MATHER,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Filed July 3, 1946. [66]

[Title of Tax Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true upon the trial of the above-entitled case, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. Petitioner was incorporated under the laws

of the State of California on July 3, 1936. Petitioner's principal business was the operation of certain bus lines in the City of Vallejo, California, and adjoining territory. Petitioner was an active operating public utility under the jurisdiction of the Railroad Commission of the State of California, and held a certificate of necessity issued by said Commission dated May 6, 1941. During all the times hereinafter mentioned the entire issued and outstanding capital stock of Petitioner [67] was owned as follows:

Luther E. Gibson.....	100
Frank O. Bell.....	100
Harry V. Soanes.....	200

2. On or before May 19, 1942, Luther E. Gibson, Frank O. Bell and Harry V. Soanes entered into an oral partnership agreement for the purpose of acquiring and operating the bus lines then owned and operated by Petitioner. The interests in the capital and profits of said partnership were as follows:

Luther E. Gibson.....	$\frac{1}{4}$
Frank O. Bell.....	$\frac{1}{4}$
Harry V. Soanes.....	$\frac{1}{2}$

On November 12, 1942, said oral partnership agreement was reduced to writing, a copy of which is attached hereto and marked "Exhibit 1." On May 19, 1942, said partnership, doing business under the firm name and style of Vallejo Bus Co., offered to

purchase the operative rights of Petitioner and all Petitioner's assets except four Reo buses for the sum of \$29,937.20.

3. At a special meeting of the Board of Directors of Petitioner held on May 19, 1942, said offer of said partnership was accepted, as set forth in the minutes of said special meeting, a copy of which is attached hereto and marked "Exhibit 2."

4. Said partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of said business on and after that date were deposited in said bank account.

5. On or about June 11, 1942, endorsements were requested [68] with respect to all policies of insurance issued to Petitioner naming as assured on said policies Luther E. Gibson, Harry V. Soanes and Frank O. Bell, doing business as Vallejo Bus Co. Said endorsements were made by the insurers and were effective on or before June 11, 1942.

6. Record legal title of automobiles as evidenced by ownership certificates were not surrendered to the State authorities for transfer from Vallejo Bus Company to Vallejo Bus Co., and it was not until new ownership certificates were issued in the succeeding year that the record legal title was thus transferred.

7. Petitioner and said partnership entered into an agreement dated June 9, 1942, a copy of which is attached hereto and marked "Exhibit 3."

8. On June 9, 1942, Petitioner filed a petition

with the Railroad Commission of the State of California requesting the Commission to approve the sale and transfer of its assets. On September 15, 1942, said Commission issued its order granting the application of Petitioner and authorizing the transfer of the properties described in said agreement of June 9, 1942. A copy of said petition and a copy of said order of said Commission are attached hereto and marked "Exhibit 4" and "Exhibit 5," respectively. Pursuant to said order and subsequent to September 15, 1942, Petitioner and Luther E. Gibson, Frank O. Bell and Harry V. Soanes, co-partners doing business under the firm name and style of Vallejo Bus Co., duly filed an appropriate time schedule and a withdrawal and adoption notice of tariffs. In said order, said Commission further ordered Luther E. Gibson, Frank O. Bell and Harry V. Soanes, co-partners doing business under the firm name and style of Vallejo Bus Co., to file with said Commission within thirty days, a copy of their partnership agreement. A copy of said agreement was filed with said Commission on November 13, 1942.

9. Petitioner was dissolved on December 31, 1942. Petitioner filed its income tax return for the calendar year 1942 with the Collector of Internal Revenue for the First District of California and reported therein income from the operation of said bus lines for the period January 1, 1942, to May

31, 1942. Said partnership filed its income tax return with the Collector of Internal Revenue for the First District of California and reported therein income from the operation of said bus lines for the period June 1, 1942, to December 31, 1942. The Commissioner has taxed to Petitioner income from the operation of said bus lines for the period June 1, 1942, to September 15, 1942. The only issue in controversy is whether the Commissioner erred in making this adjustment.

10. If the Court determines that the income from the operation of said bus lines for the period June 1, 1942, to September 15, 1942, was correctly reported by said partnership, then there is no deficiency in Petitioner's income tax or declared value excess profits tax for the calendar year 1942, and the deficiency in Petitioner's excess profits tax for the [70] calendar year 1942 is the sum of \$344.26. If the Court determines that the income from the operation of said bus lines from the period June 1, 1942, to September 15, 1942, is taxable to Petitioner, then the deficiencies to be determined by the Court as follows: Declared value excess profits tax deficiency of \$3,074.94, and excess profits tax deficiency of \$27,721.76. It is stipulated that Luther E. Gibson, Docket No. 11045, Frank O Bell, Docket No. 11044, and Harry V. Soanes, Docket No. 11043, are transferees of Petitioner herein and as such are liable for such deficiencies

as may be determined in this proceeding, together with interest thereon as provided by law.

Dated May 20, 1947.

/s/ LEON DE FREMERY,
/s/ CLARENCE E. MUSTO,
Attorneys for Petitioner.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.
By TMM. [71]

EXHIBIT No. 1

This Agreement of Partnership, made and entered into this 12th day of November, 1942, between Luther E. Gibson, Harry V. Soanes, and Frank O. Bell, all of the City of Vallejo, Solano County, California;

Witnesseth:

That said parties hereto mutually agree as follows:

1. The said parties hereto shall as partners engage in the business of owning and operating an automotive service for the common carrier transportation of passengers and such allied businesses and operations as may hereafter be agreed upon by said partners.
2. That the name of said partnership shall be Vallejo Bus Co.
3. That the place of business of said partner-

ship shall be located in the City of Vallejo, County of Solano, State of California.

4. That the capital of said partnership shall be Twenty-nine thousand Nine Hundred thirty-seven and 27/100 (\$29,937.27) Dollars, being the purchase price of the operative rights and properties of "Vallejo Bus Company, a Corporation," all as more particularly described in an agreement made and entered into June 9, 1942, by and between said "Vallejo Bus Company, a corporation" as Seller, and the parties hereto as co-partners, as Buyers; and it is agreed that said [72] capital has been contributed by said partners in the following proportions: One-fourth thereof by Luther E Gibson, one-half thereof by Harry V. Soanes, and one-fourth thereof by Frank O. Bell.

5. That each partner shall devote such time and attention to the business of the partnership as may from time to time be agreed upon by said partners, and each partner shall have only such power and authority and responsibility as may from time to time be agreed upon by said partners and each partner shall receive such salary for such services as may from time to time be agreed upon by said partners; it being specifically agreed that in all partnership matters, a majority in interest shall determine such matters as may be brought before said partners for determination.

6. That full and accurate accounts of all transactions of said partnership shall be kept in proper books of account, and each partner shall cause to

be entered upon said partnership books a full and accurate account of all transactions on behalf of the partnership; that said books of the partnership shall be kept at the place of business of the partnership and each party shall at all times have access to and may inspect and copy any of them. That until otherwise determined upon by said partnership, said books shall be kept under the general **supervision** of L. H. Penney and Company, Certified Public Accountants, and in the event of any dispute among the partners as to any accounting matters, the decision of said [73] L. H. Penney and Company, or such other certified public accountants as may succeed said firm, shall be final and binding upon each and all of the partners.

7. That neither partner will, without the consent of the partnership, make, execute, deliver, endorse or guarantee any notes or other commercial paper, nor agree to answer for or indemnify against any act, debt, default or misconduct of any person.

8. That in order to assure continuity in management and operation of said partnership, in the event of the death of any partner, it is agreed that some comprehensive scheme involving insuring the lives of the partners, the premiums to be paid out of the partnership funds, shall be arranged for and agreed upon by the partners, and that the same shall be put into effect just as soon as possible after the execution of this agreement.

9. The partners hereto agree to exercise the ut-

most of good faith in all details of their dealings with each other, and to fully and completely confide in each other in all partnership matters, to the end that a spirit of cordiality and confidence shall exist among them at all times, and each partner agrees to do and perform such acts as may be necessary to insure the success of said partnership venture.

In Witness Whereof, the parties hereto have hereunto [74] set their hands, the day and year first hereinabove written.

LUTHER E. GIBSON,
HARRY V. SOANES,
FRANK O. BELL. [75]

EXHIBIT No. 2

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF THE VALLEJO BUS
COMPANY

May 19, 1942

A special meeting of the Board of Directors of The Vallejo Bus Company was held in the office of President Luther E. Gibson, 516 Marin Street, Vallejo, California, at 10:00 o'clock a.m. on the above date.

Directors present: President, Luther E. Gibson; Vice President, Harry V. Soanes; Secretary, Frank O. Bell.

Russell F. O'Hara, attorney for the Corporation

and L. Penney, Auditor and Accountant, also were present.

The meeting was called to order by President Luther E. Gibson.

The minutes of the last meeting were read and approved.

There was thereupon placed before the Board by Russell F. O'Hara, a proposition whereby the Corporation would transfer it's operative rights and assets to Luther E. Gibson, Harry V. Soanes and Frank O Bell, a Co-Partnership doing business under the firm name and style of The Vallejo Bus Co.

After some discussion an offer was made to the Corporation by Luther E. Gibson, Harry V. Soanes and Frank O. Bell to purchase the operative rights and all of the assets of the Corporation save and except four Reo buses bearing motor numbers:

110A-4135

110A-4414

110A-4724

110A-4925

for the sum of \$29,937.20 cash; said sale to become effective on the 1st day of June, 1942, subject to the approval of said transfer by the Railroad Commission of the State of California.

Following some discussion concerning said offer it was regularly moved and seconded that the following resolution be adopted:

“Be it resolved: That the offer made to this Corporation by Luther E. Gibson, Harry V.

Soanes and Frank O. Bell, Co-Partners doing business under the firm name and style of The Vallejo Bus Co. to purchase the operative rights of the Corporation and all of the assets of the Corporation save and except four Reo Busses bearing motor numbers 110A-4135, 110A-4414, 110A-4724 and 110A-4925, for the sum of \$29,937.20 be and the same is hereby accepted; and that the sale and transfer of said operative rights and assets be effective as of the 1st day of June, 1942, subject to the approval of the Railroad Commission of the State of California, and that the President and Secretary of the Corporation be authorized to execute and deliver all documents, papers and agreements necessary to complete said sale and transfer, and to file all necessary petitions and pleadings and documents with the Railroad Commission of the State of California."

Voted and unanimously approved.

It was further moved and seconded and approved that copies of necessary agreements and papers executed by the Corporation in connection with the above resolution be attached to the minutes of this meeting and be made part thereof.

There being no further business, the meeting adjourned.

/s/ FRANK O. BELL,
Secretary. [77]

EXHIBIT No. 3.

This Agreement, made and entered into this 9th day of June, 1942, by and between Vallejo Bus Company, a corporation, as Seller, and Luther E. Gibson, Harry V. Soanes and Frank O. Bell, co-partners doing business under the firm name and style of Vallejo Bus Co., as Buyers;

Witnesseth:

That said Seller agrees to sell unto said Buyers and said Buyers agree to buy of and from said Seller, the following described personal property, to wit:

Being the following busses, to wit:

1936 Federal	Motor No. 554586
1936 Studebaker	Motor No. DR58574
1928 Yellow Coach	Motor No. 2493217
1940 International	Motor No. HD213C949
1940 International	Motor No. HD213C935
1929 Yellow Coach	Motor No. 337829
1929 Yellow Coach	Motor No. 3-38724Y
1932 Twin Coach	Motor No. 506527
1932 Twin Coach	Motor No. 506681
1932 Twin Coach	Motor No. 506526
1932 Twin Coach	Motor No. 506743
1932 Yellow Coach	Motor No. 2596241
1929 Yellow Coach	Motor No. S20483Y
1941 Chevrolet	Motor No. AJ1130927
1941 Chevrolet	Motor No. BJ2177
1941 Chevrolet	Motor No. 2AJ1130920
1941 Chevrolet	Motor No. 2AJ1130944
1942 Chevrolet	Motor No. BA283526

Coupe

Also, all machinery, tools and equipment, furniture and fixtures, transportation equipment including coin boxes, all business fixtures and improvements to the premises from which the

business of said Seller is operated, together with materials and supplies therein contained, and prepaid insurance; also all franchises and operating rights of the said Seller.

To Have and to Hold the same unto said Buyers for [78] the sum of Twenty Nine Thousand Nine Hundred Thirty Seven and 20/100 (\$29,937.20) Dollars, in lawful money of the United States of America, receipt of which is hereby acknowledged by the said Seller.

It Is Understood and Agreed that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, and the parties hereto shall be and remain in the same relationship and in the same situation that they are in prior to the execution of this agreement, and shall occupy the identical positions and relationships that they would have occupied had this agreement not existed.

Upon receiving the approval of the Railroad Commission of the State of California to said sale, the parties hereto and each of them agree to execute and deliver any and all instruments and documents necessary or convenient to carry into being the full intent and purpose of this agreement, and at such time the parties hereto shall negotiate a lease in terms agreeable to both parties, wherein

and whereby said Seller shall lease unto said Buyers the following described Reo busses of the said Seller:

Motor No. 110A-4135

Motor No. 110A-4414

Motor No. 110A-4724

Motor No. 110A-4925

In Witness Whereof, the parties hereto have executed [79] this agreement in duplicate, the day and year first above written.

VALLEJO BUS COMPANY,
a Corporation,

By LUTHER E. GIBSON,
President,

By FRANK O. BELL,
Secretary.

LUTHER E. GIBSON,

FRANK O. BELL,

HARRY V. SOANES,

Co-Partners doing business under the firm name
and style of Vallejo Bus Co. [80]

EXHIBIT No. 4

Before the Railroad Commission of the State
of California

In the matter of the Application of Vallejo Bus Company, a corporation, to sell, and of Luther E. Gibson, Harry V. Soanes, and Frank O. Bell, co-partners doing business under the firm name and style of Vallejo Bus Co., to purchase the automotive service for the common carrier transportation

of passengers between the City of Vallejo and Mare Island Navy Yard, Vallejo Annex, Emerald Terrace, Bay Terrace, Vista de Vallejo, Fairmont Gardens, Hanns Tract, Highway Homes Addition, and South Vallejo, and intermediate points as a unified and consolidated operation.

PETITION

The petition of Vallejo Bus Company, a corporation, and Luther E. Gibson, Harry V. Soanes and Frank O. Bell, co-partners doing business under the firm name and style of Vallejo Bus Co., respectfully shows:

That applicant Vallejo Bus Company, a corporation, is at the present time engaged in the operation of an automotive service for the transportation of passengers between the City of Vallejo and Mare Island Navy Yard, Vallejo Annex, Emerald Terrace, Bay Terrace, Vista de Vallejo, Fairmont Gardens, Hanns Tract, Highway Homes Addition, and South Vallejo, and intermediate points, under a certificate heretofore granted by the Railroad Commission of the State of California, by Decision No. 34167 dated May 6, 1941, and its amendments and supplements.

That the postoffice addresses of each of the applicants is as follows:

Vallejo Bus Company, a corporation, 316 Napa Street, Vallejo, Calif.

Luther E. Gibson, Harry V. Soanes and Frank O. Bell, Co-Partners Doing Business under the Firm Name and [81] Style of Vallejo Bus Co., 316 Napa St., Vallejo, Calif.

Luther E. Gibson, 1137 Tuolumne St., Vallejo, California.

Harry V. Soanes, 1094 Calaveras Street, Vallejo, California.

Frank O. Bell, 1117 Tuolumne Street, Vallejo, California.

The Applicant, Vallejo Bus Company, a corporation, proposes to sell, and Applicant Luther E. Gibson, Harry V. Soanes and Frank O. Bell, co-partners doing business under the firm name and style of Vallejo Bus Co., propose to purchase the operative rights used in the business of transporting passengers between the City of Vallejo and Mare Island Navy Yard, Vallejo Annex, Emerald Terrace, Bay Terrace, Vista de Vallejo, Fairmont Gardens, Hanns Tract, Highway Homes Addition, and South Vallejo, and intermediate points, under an agreement heretofore entered into, a copy of which is attached hereto and marked Exhibit A.

The consideration to be paid for the property herein proposed to be transferred, is the sum of \$29,937.20 of which the sum of \$28,437.20 represents the value of the equipment, and \$1500.00 represents the value of the operative rights.

Wherefore, Applicants ask that the Railroad Commission of the State of California make its

order authorizing the transfer as herein petitioned for.

Dated at Vallejo, California, [82] this 9th day of June, 1942.

VALLEJO BUS COMPANY,
a Corporation,

By LUTHER E. GIBSON,
President,

By FRANK O. BELL,
Secretary.

LUTHER E. GIBSON,
FRANK O. BELL,
HARRY V. SOANES,

Co-Partners Doing Business Under the Firm
Name and Style of Vallejo Bus Co.

O'HARA & RANDALL and
VICTOR M. CASTAGNETTO,
Attorneys for Applicants. [83]

State of California,
County of Solano—ss.

Luther E. Gibson, Harry V. Soanes and Frank O. Bell, being first duly sworn, each for himself, deposes and says: That he has read the foregoing application and knows the contents thereof; that the same is true of his own knowledge, except as to

the matters therein stated on information and belief, and as to such matters, he believes it to be true.

LUTHER E. GIBSON,
HARRY V. SOANES,
FRANK O. BELL.

Subscribed and sworn to before me this 9th day of June, 1942.

[Seal] SYLVIA S. SPENCER,
Notary Public in and for the County of Solano,
State of California. [84]

State of California,
County of Solano—ss.

Luther E. Gibson and Frank O. Bell, being first duly sworn, depose and say: That they are the President and Secretary, respectively, of Vallejo Bus Company, a corporation, Applicant in the foregoing Petition named; that they have read the same and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated on information and belief, and as to such matters, they believe it to be true.

LUTHER E. GIBSON,
FRANK O. BELL.

Subscribed and sworn to before me this 9th day of June, 1942.

[Seal] SYLVIA S. SPENCER,
Notary Public in and for the County of Solano,
State of California. [85]

EXHIBIT No. 5

VALLEJO BUS COMPANY

APPLICATION No. 25072

ORDER OF RAILROAD COMMISSION OF
THE STATE OF CALIFORNIA

A public hearing having been held on the above entitled application before Examiner Fankhauser, and the Commission having considered the testimony submitted at such hearing and it being of the opinion that this application should be granted subject to the provisions of this order, therefore,

It Is Hereby Ordered that Vallejo Bus Company, a corporation, be, and it is hereby, authorized to transfer, on or before December 31, 1942 to Luther E. Gibson, Harry V. Soanes and Frank O. Bell, copartners doing business under the firm name and style of Vallejo Bus Co., the properties described in the agreement on file in this proceeding, together with the operative rights created by Decision No. 34167, dated May 6, 1941, as amended by Decision No. 34355, dated July 1, 1941, as amended by Decision No. 34484, dated August 12, 1941, as amended by Decision No. 35195, dated March 31, 1942, and as amended by Decision No. 35331, dated May 5, 1942, provided, that the authority hereby granted is subject to the provisions of Section 52(b) of the Public Utilities Act, and further to the condition that Luther E. Gibson, Harry V. Soanes and Frank O. Bell, copartners doing business under the firm name and style of Vallejo Bus Company, their successors and assigns shall never claim before [86] this Commission or any court or

any other public body, a value for said operative rights, or claim as the cost thereof, an amount in excess of that paid for said rights by those to whom said rights were originally granted.

It Is Hereby Further Ordered that Vallejo Bus Company and Luther E. Gibson, Harry V. Soanes and Frank O. Bell, copartners doing business under the firm name and style of Vallejo Bus Co., comply with Part IV of General Order No. 93-A and General Order No. 79 by filing an appropriate time schedule and a withdrawal and adoption notice of tariffs within sixty (60) days of the date hereof and upon not less than one (1) day's notice to the Commission and public.

It Is Hereby Further Ordered that Luther E. Gibson, Harry V. Soanes and Frank O. Bell, copartners doing business under the firm name and style of Vallejo Bus Co., shall within thirty (30) days after they acquire the aforesaid properties, file with the Commission a copy of their partnership agreement.

It Is Hereby Further Ordered that this order shall become effective upon the date hereof.

Dated at San Francisco, California, this 15th day of September, 1942.

JUSTUS F. CRAEMER,
C. C. BAKER,
FRANCK R. HAVENNER,
RICHARD SACHSE,
Commissioners.

[Endorsed]: Filed May 26, 1947. [87]

PETITIONER'S EXHIBIT No. 1

Decision No. 36242

Before the Railroad Commission of the State of California.

Case No. 4672

In the Matter of the Investigation on the Commission's own motion into the reasonableness of the rates, rules, regulations, charges, classifications, contracts, practices, operations and service, or any of them, of Vallejo Bus Company.

Morrison, Hohfeld, Foerster, Shuman & Clark, by Forrest A. Cobb, and Frank O. Bell, for respondent Vallejo Bus Company; John Stewart, Mayor, City of Vallejo; Rollin L. Pope, City Attorney, City of Vallejo; George J. O'Neill, for Petaluma Subdivision; C. F. Hatch, for Vallejo Chamber of Commerce; Ollie Ross, for certain taxpayers.

Sachse, Commissioner:

OPINION

On February 4, 1943, an investigation into the reasonableness of the fares of the Vallejo Bus Company was instituted by the Commission on its own motion, after a preliminary survey of the situation and recommendation by the staff.

Public hearings were held in Vallejo March 3 and 10, 1943. The matter is now under submission and is ready for decision.

At the hearing a report was presented by the

Commission's Transportation Research Engineer Homer H. Grant as Exhibit No. 1 setting forth the past operating results of the Vallejo Bus Company, together with estimated results which would obtain under different fare structures.

It is shown in this exhibit that Vallejo has had a tremendous war-time growth and that the operations of the company have increased correspondingly. The population of the city increased from approximately 30,000 in 1940 to more than 90,000 on January 1, 1943 (an increase of 200 per cent), whereas the number of passengers carried by the company increased about ten times, viz., from 345,000 in 1940 to nearly 3,000,000 in 1942.

A very large number of temporary housing units have been constructed in government housing projects in and adjacent to the City. [88] The type of construction employed in these projects is in keeping with their present use as contrasted with a normal and more permanent building program. Service of the Vallejo Bus Company has been extended to include all of the new projects except Chabot Terrace, which is approximately five miles from the business center of the city. This new subdivision is provided with local transportation by buses operated by the Navy when not engaged in its regular service in transporting passengers to and from the Navy Yard at Mare Island.

A recent revision of routes effective January 1, 1943, increased the number of routes in operation from six to nine. The coach mileage was thereby

increased from 1,500 miles per day to more than 2,100 miles per day, or 45 per cent. Sections of the highway along some of the routes are in a bad condition owing to heavy travel and inadequate maintenance.

Since June 1, 1941, the company has been owned by Luther E. Gibson, President, Harry B. Soanes, Vice President, and Frank O. Bell, Manager, having control relationships of 25 per cent, 50 per cent, and 25 per cent, respectively. The company operated as a corporation until June 1, 1942, after which time it becomes a partnership.

It is shown in Exhibit No. 1 that from June 30, 1941, to January 31, 1943, the book cost of property devoted to public service, including \$350 for organization, materials, and supplies, increased from approximately \$10,000 to \$96,000. The depreciated book cost of property increased from \$9,757 to \$82,078 during the same period. Depreciation reserves were calculated by the engineer on the basis of depreciable lives used in the report, namely: two years for old equipment; for fairly new equipment, five years for coaches costing approximately \$4,500 and six years for coaches costing approximately \$6,500 each. It was assumed that old equipment would be retired at the end of the [89] present emergency, whereas new equipment would continue to be used under the substantial peace-time operations which may be expected to continue during the postwar period.

The company owns no land at the present time.

Transit equipment consists of 25 motor coaches. nine of which are at least ten years old, one is six years old, and the remaining 15 are quite new. The new coaches are largely of Reo manufacture with transit type bodies seating 32 persons. These were purchased at an average cost of approximately \$6,000.

Present fares in Vallejo are 10 cents cash, or three tokens for 25 cents, with a 5-cent school fare. With these fares in effect operating revenues of the company increased from \$10,614 in January, 1942, to \$35,998 in January, 1943.

The record shows that based on the average depreciated book cost of property, with no allowance for working capital but after payment of income taxes,¹ the company, after showing a loss in 1938, earned a rate of return as follows: 19 per cent for 1939; 59 per cent for 1940; 103 per cent for 1941; and 121 per cent for 1942. The operating figures for this five-year period are shown on the following Table I, which is taken from Exhibit I, Schedule IV.

¹ Estimated for 1942 by the Commission's engineer.

Table I

VALLEJO BUS COMPANY

STATEMENT OF OPERATING INCOME AND RATE OF RETURN

1938-1942, inclusive

Item	1938	1939	1940	1941	1942
Revenue Passengers.....	278,587	273,988	345,535	702,386	2,909,888
Operating Revenue.....	\$25,262.20	\$20,867.62	\$31,098.19	\$65,079.83	\$265,627.62
Operating Expenses.....	26,618.95	19,789.66	27,297.11	51,372.58	140,979.67
Operating Income.....	\$ 1,356.75*	\$ 1,077.96	\$ 3,801.08	\$13,707.25	\$124,647.95
(Before Income Tax)					
Income Tax.....	\$ 278.07	\$ 5,500.00	\$ 59,328.13
Operating Income.....	\$ 1,356.75*	\$ 1,077.96	\$ 3,523.01	\$ 8,207.25	\$ 65,319.82
(After Income Tax)					
Book Cost of Prop.....	\$15,346.98	\$12,137.52	\$14,644.08	\$35,459.13	\$ 95,549.75
Less Reserve for Depr.....	8,783.49	7,513.13	7,418.43	10,766.25	12,859.15
Deprec. Book Cost.....	\$ 6,563.49	\$ 4,624.39	\$ 7,225.65	\$24,692.88	\$ 82,690.60
Avg. Depreciated Book Cost.....	8,282.13	5,593.94	5,925.02	7,983.03	53,869.83
Rate of Return on Avg. Deprec. Book Cost After Income Tax (%).....	16.38*	19.27	59.5	103.0	121.3

*—Red Figure.

The present service and operation is on a somewhat different basis from that before January 1, 1943, as the routing was materially increased. The month of January, 1943, provides the only actual operating experience under the company's expanded service program. After showing that January was a representative month in Vallejo, the Commission's engineer expanded January figures to a yearly basis, using actual passengers carried with no allowance for any increase in the number of passengers who undoubtedly would be attracted by a reduction in fares. On this conservative basis, but using 1942 income tax rates, the rate of return for 1943 would be 106 per cent under present fares and 24 per cent under a straight 6-cent fare, whereas a straight 5-cent fare would indicate a substantial yearly loss calculated on the rate base used in the engineer's report. Increased income taxes in 1943 would further reduce these rates of return.

Mr. Grant testified that while a 6-cent fare would appear to be liberal he suggested that the Commission give consideration to a token fare of five tokens for 30 cents with a 10-cent cash fare because the company is not at this time equipped with fare boxes to register pennies and new coin boxes cannot now be obtained.

Representatives of the company requested and were granted a week to study the report of the Commission's engineer, after which time another hearing was held in Vallejo on March 10, 1943. At

the adjourned hearing the representatives of the company pointed out that the owners of the property had reinvested the earnings in purchasing new equipment to further improve the service in the city, that the service has been very greatly expanded from the normal peace-time operations, and that the risk incurred by the company is abnormally high owing to the war-time temporary development of the city and the possibility of collapse if the war should be suddenly ended. The company also stated its belief that a fare of four tokens for 25 cents, 10 cents cash, would tend to increase the speed of operations somewhat over a fare of five tokens for 30 cents and 10 cents cash, because of the shorter time necessary in making change. It was further contended by the company that the net increase in revenue would be small because in its opinion the number of persons purchasing tokens under a four for 25 cents arrangement would be materially greater than the number who would purchase tokens under a fare of five for 30 cents.

The Mayor of the City of Vallejo stated that the city was interested in having the best possible service at the lowest reasonable fare, and indicated that a rate structure with four tokens for 25 cents would be more convenient for the majority of passengers than a required purchase of five tokens for 30 cents.

This record supports the following conclusions: That fares in Vallejo should be immediately reduced; that in view of the highly uncertain war-

time conditions existing in Vallejo and the consequently increased financial risk, together with the extraordinary burden on equipment owing to war-time overloading, the Commission is justified in allowing rates of return proportionately higher than would obtain [92] under normal peace-time conditions; that in the interest of providing reasonably satisfactory local transportation for the City of Vallejo at reasonable rates it appears that under the present unusual operating conditions a close check should be kept of the financial and operating results under the lower fare structure prescribed in this decision; and that a fare of four tokens for 25 cents and 10 cents cash, with a 5-cent school fare should be instituted on a temporary basis until such time as changed conditions require a further adjustment. Accordingly the following form of order is recommended.

ORDER

Public hearings have been held in the above entitled matter, the matter having been submitted, and the Commission being fully advised,

It Is Ordered that Vallejo Bus Company shall within fifteen days from the effective date of this order, establish a fare of four tokens for 25 cents and 10 cents cash without change in the present school fare.

It Is Further Ordered that notice of the reduced fares shall be conspicuously displayed in all motor

coaches of Vallejo Bus Company for a period of sixty (60) days.

It Is Further Ordered that Vallejo Bus Company shall comply with the provisions of General Order No. 79 by filing in triplicate Tariffs satisfactory to the Commission, within fifteen days from the date hereof, on not less than one day's notice to the Commission and the public.

It Is Further Ordered that jurisdiction herein shall be and it is hereby reserved by the Commission to make such further order or orders in this proceeding as the Commission in its discretion may deem [93] just and proper.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 23rd day of March, 1943.

FRANCK R. HAVENNER,
C. C. BAKER,
JUSTUS F. CRAEMER,
RICHARD SACHSE,
FRANK W. CLARK,
Commissioners.

Certified as a True Copy.

[Seal] /s/ NOEL COLEMAN,

Assistant Secretary, Public Utilities Commission,
State of California. [94]

EXCERPTS FROM PETITIONER'S
EXHIBIT No. 2

* * * *

San Francisco, California

March 1, 1943

Case No. 4672

Mr. Warren K. Brown,
Director of Transportation
and

Mr. J. G. Hunter,
Assistant Director of Transportation and
Chief Engineer

A study of the operations of the Vallejo Bus Company has been completed and is transmitted herewith.

Briefly, in my opinion, the study reveals that a six-cent fare would be adequate in Vallejo under present conditions, considering abnormal war risks. However, the company is not at present equipped to utilize multi-coin fares and it is doubtful whether multi-coin fare boxes can be obtained. It is, therefore, suggested that at least until such time as multi-coin fare boxes can be obtained, consideration be given to a fare structure of five tokens for 30 cents and ten cents cash. This would eliminate the use of pennies and speed up operations, yet provide interested passengers with a six-cent fare. A six-cent fare should save the people of Vallejo approximately \$145,000 each year; while, with a fare structure of five tokens for 30 cents, ten cents cash, the saving should be approximately \$126,000 each year.

Mr. O. B. Liersch, Associate Engineer, examined the books of the company and prepared the schedules in this report.

Respectfully submitted,

/s/ HOMER H. GRANT,

Transportation Research Engineer.

* * * *

SCOPE OF INVESTIGATION

The scope of this investigation has been limited largely to matters relating directly to fares. Service of the company was recently reviewed in a report prepared by the Service and Permit Division, which resulted in rerouting of certain lines effective January 1, 1943.

* * * *

DEVELOPMENT OF TRANSIT COMPANY

The original Vallejo Bus Company was a co-partnership, composed of H. N. Richards, V. C. Gorst, and H. W. Lowell, which began operation on December 4, 1915, for the transportation of passengers over regular routes wholly within the incorporated limits of the City of Vallejo. The co-partnership thereafter from time to time was granted certificates from the Railroad Commission to extend its operations over various routes in the vicinity of Vallejo.¹

¹ Application No. 4834, Decision No. 6611, August 29, 1919;

Application No. 5428, Decision No. 7465, April 21, 1920;

Application No. 6098, Decision No. 8182, October 1, 1920.

Mr. H. W. Lowell acquired the interests of Mr. Richards and Mr. Gorst on March 21, 1927,² thereby becoming the sole owner of Vallejo Bus Company. Upon the death of Mr. Lowell in 1935, Agnes Irene Geer and Bruce McCarthy were named executrix and co-executor, respectively. The Vallejo Bus Company, a corporation, on August 17, 1936, acquired all right, title, and interest in the estate of H. W. Lowell. After the death of Mr. Lowell the executrix and later the corporation filed various other applications for extensions and changes in operating rights.³

² Application No. 13588, Decision No. 18099, March 21, 1927.

³ Application No. 24037, Decision No. 28733, April 20, 1936;

Application No. 20683, Decision No. 29057, August 17, 1936;

Application No. 20744, Decision No. 29138, September 28, 1936;

Suppl. Appl. No. 4834, Decision No. 30882, May 23, 1938, rerouting service between Vallejo and Vallejo Annex;

Application No. 22600, Decision No. 32236, August 8, 1939, application to discontinue South Vallejo and Solano Service, dismissed;

Suppl. Appl. No. 4834, Decision No. 34167, May 6, 1941;

Suppl. Appl. No. 20437, Decision No. 34196, May 13, 1941;

Suppl. Appl. No. 4834, and Suppl. Appl. No. 20437, Decision No. 34355, July 1, 1941;

Suppl. Appl. No. 20437, Decision No. 34484, August 12, 1941;

2nd Suppl. Appl. No. 20437, Decision No. 35195, March 31, 1942;

3rd Suppl. Appl. No. 20437, Decision No. 35331, May 5, 1942.

On June 1, 1941, Luther E. Gibson, Harry B. Soanes, and Frank O. Bell acquired the corporate stock of the Vallejo Bus Company and took over the management. On June 19, 1942, Vallejo Bus Company (a corporation) filed Application No. 25072 to sell its operative rights and property to the Vallejo Bus Company, a partnership consisting of Mr. Gibson, Mr. Soanes, and Mr. Bell. The present proportion of ownership, we understand, is as follows: Soanes, 50 per cent; Gibson, 25 per cent; and Bell, 25 per cent. This application was granted under Decision No. 35777, dated September 15, 1942. On December 15, 1942, all previous certificates, except between Vallejo and Mare Island were revoked and a new certificate was granted to the partnership to operate over routes in Vallejo and contiguous territory.⁴

Authority for suspension of service between Mare Island and the City of Vallejo during the time passenger bus service is operated by the Naval authority was also granted on December 15, 1942.⁵

The Vallejo Bus Company, a corporation, transferred most of its operating property to the partnership as of June 1, 1942; however, some of the motor coach equipment was retained by the corporation which continued in existence until the end of 1942, for various technical reasons. However, in this report the corporate structure has been dis-

⁴ Application No. 25408, Decision No. 36028, December 15, 1942. See "Service" for description of routes.

regarded, except where involved in income tax computations, and the net earning power of the company is related directly to the property used and useful in the public service. [98]

INCOME TAX

Income taxes computed herein are based on the actual type of organization of the company. In other words, the first five months of 1942, are computed on a corporation basis and remaining months are on a partnership basis. Since this study concerns only the operations of the Vallejo Bus Company rates must be applied as though income from the company is the only income of a partner. A partner having several profitable businesses will of course find his tax reaching the higher tax rate brackets. However, consideration of this hypothetical question is beyond the scope of this investigation.

In computing the rates of return shown in Table III and Schedule IV income taxes have been treated as an expense, in conformance with rulings of the U. S. Supreme Court. With regard to income tax the court said in *Georgia Railway Company vs. Railroad Commission*:⁷ "The Commission treated the tax as a proper operating charge. The court disallowed it and thus increased its estimate of probable net income. In this the court erred."

10 T. C. No. 17

The Tax Court of the United States
The Vallejo Bus Company, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Harry V. Soanes, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Frank O. Bell, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Luther E. Gibson, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 11046, 11043, 11044, 11045

Promulgated January 23, 1948

The shareholders of a California corporation engaged in the operation of a bus line took over the corporation's business and assets on June 1, 1942, under a contract of purchase and sale, and continued operation of the business as partners. By California statute the sale of a public utility is void until approved by the California Railroad Commission which did not give its approval of this sale until September 15, 1942. The contract provided that the sale be subject to such approval and void if not approved.

Income from operation of the business during the period June 1-September 15, 1942, held, taxable to the corporation and not to the partners.

CLARENCE E. MUSTO, ESQ.,

For the Petitioners.

THOS. M. MATHER, ESQ.,

For the Respondent. [100]

OPINION

Johnson, Judge: The Commissioner determined against the Vallejo Bus Company (hereafter called petitioner corporation) a deficiency of \$3,074.94 in declared value excess-profits tax and a deficiency of \$27,721.76 in excess-profits tax for the year 1942, and asserted against the individual petitioners. Harry V. Soanes, Frank O. Bell and Luther E. Gibson, as transferees of petitioner corporation's assets, liability for these deficiencies. The individual petitioners concede liability for any deficiency due, but contend that the Commissioner erroneously included in the corporation's 1942 income the profits of their partnership for the period June 1-September 15, 1942. The proceedings were consolidated for hearing and decision and were submitted upon a stipulation and exhibits which we adopt as findings of fact and from which it appears that:

The Vallejo Bus Company, a California corporation with principal office at Vallejo, California, filed its income and profits tax returns for 1942 with the collector of internal revenue for the first district of California. It engaged in the operation of bus lines in the vicinity of Vallejo, and reported income from such operations for the period January 1-May 31, 1942. The individual petitioners, all residents of Vallejo and shareholders of the corporation, formed a partnership which acquired the bus lines, and filed a partnership return for 1942 with the same collector, reporting income from bus operation for the period June 1-December 31, 1942.

Under the view that the partnership's acquisition did not become effective until September 15, 1942, the Commissioner shifted the income from the business for the period June 1-September 15 from the partnership to the corporation, and [101] this shift the petitioners assail.

As a public utility, the petitioner corporation was subject to the Railroad Commission of the State of California. Of its capital stock, petitioner Soanes owned 50 per cent; Gibson and Bell, 25 per cent each. Having decided to operate the business as a partnership, the three made an oral agreement on May 19, 1942, to acquire and operate the lines under the firm name of Vallejo Bus Co., each having an interest in the partnership proportionate to his share-holdings in the corporation. The oral partnership agreement was reduced to writing and signed by the parties on November 12, 1942. The partnership, on May 19, 1942, made offer to petitioner corporation to purchase its operative rights and all of its assets except four Reo buses, for the sum of \$29,937.20 cash, which offer petitioner corporation on that day accepted and in the minutes of petitioner corporation concerning the transaction it is recited that the offer of sale and acceptance was

* * * to become effective on the first day of June, 1942, subject to the approval of said transfer by the Railroad Commission of the State of California.

The contract of sale between petitioner corpora-

tion and the partnership was reduced to writing and signed by the parties on June 9, 1942, and in it was contained the following:

It Is Understood and Agreed that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, and the parties hereto shall be and remain in the same relationship and in the same situation that they are in prior to the execution of this agreement, and shall occupy the identical positions and relationships that they would have occupied had this agreement not existed. [102]

Upon receiving the approval of the Railroad Commission of the State of California to said sale, the parties hereto and each of them agree to execute and deliver any and all instruments and documents necessary or convenient to carry into being the full intent and purpose of this agreement, * * *

On June 9, 1942, petitioner corporation as seller and the individual partners as buyers filed a petition with the Railroad Commission of the State of California, requesting the Commission to approve the sale and transfer of its assets and operative rights to the partnership, and on September 15,

1942, the Commission issued its order granting and approving same and further requiring that the partnership within sixty days file an appropriate time schedule and a withdrawal and adoption notice of tariffs as required by the Commission's regulations, and furthermore to file within thirty days a copy of the partnership agreement. Petitioner corporation was dissolved on December 31, 1942.

The partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of the business on and after that date were deposited in such bank account.

Effective on or before June 11, 1942, the beneficiaries in all policies of insurance were changed from petitioner corporation to "Luther E. Gibson, Harry V. Soanes and Frank O. Bell, doing business as Vallejo Bus Co." The record legal title of automobiles owned by petitioner corporation was not changed to the partnership until 1943.

Were the profits derived from the operation of the bus lines from June 1, 1942, to September 15, 1942, taxable to petitioner corporation? The answer depends upon when the sale and transfer from the corporation to the partnership was consummated. Petitioner says this was June 1; respondent [103] contends it was September 15. Under the law of the State of California,¹ no public utility (such as

¹ General Laws of the State of California—Public Utilities Act. Sec. 51.

tion and the partnership was reduced to writing and signed by the parties on June 9, 1942, and in it was contained the following:

It Is Understood and Agreed that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, and the parties hereto shall be and remain in the same relationship and in the same situation that they are in prior to the execution of this agreement, and shall occupy the identical positions and relationships that they would have occupied had this agreement not existed. [102]

Upon receiving the approval of the Railroad Commission of the State of California to said sale, the parties hereto and each of them agree to execute and deliver any and all instruments and documents necessary or convenient to carry into being the full intent and purpose of this agreement, * * *

On June 9, 1942, petitioner corporation as seller and the individual partners as buyers filed a petition with the Railroad Commission of the State of California, requesting the Commission to approve the sale and transfer of its assets and operative rights to the partnership, and on September 15,

1942, the Commission issued its order granting and approving same and further requiring that the partnership within sixty days file an appropriate time schedule and a withdrawal and adoption notice of tariffs as required by the Commission's regulations, and furthermore to file within thirty days a copy of the partnership agreement. Petitioner corporation was dissolved on December 31, 1942.

The partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of the business on and after that date were deposited in such bank account.

Effective on or before June 11, 1942, the beneficiaries in all policies of insurance were changed from petitioner corporation to "Luther E. Gibson, Harry V. Soanes and Frank O. Bell, doing business as Vallejo Bus Co." The record legal title of automobiles owned by petitioner corporation was not changed to the partnership until 1943.

Were the profits derived from the operation of the bus lines from June 1, 1942, to September 15, 1942, taxable to petitioner corporation? The answer depends upon when the sale and transfer from the corporation to the partnership was consummated. Petitioner says this was June 1; respondent [103] contends it was September 15. Under the law of the State of California,¹ no public utility (such as

¹ General Laws of the State of California—Public Utilities Act. Sec. 51.

the bus lines here) could be sold "without first having secured from the Railroad Commission an order authorizing" it. And the act further provides that any "such sale made other than in accordance with the order of the Commission authorizing same shall be void." The order of the Commission authorizing the sale was not obtained until September 15, 1942, and transactions prior thereto would appear to be executory and lacking in finality.

The petitioner corporation, however, in its brief, asserts that the date on which the Railroad Commission promulgated its approval of the sale and transfer is not material in determining the effective date thereof, and cites *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656 (1915), and *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915 (1930). These cases do not sustain petitioner's contention. *Hanlon v. Eshleman* was a mandamus proceeding brought to compel the Railroad Commission of California to pass upon the proposed sale of a public utility which the owner had contracted to sell to complainant but refused to carry out; the owner had not applied to the Commission for authority to make the sale; the City of Los Angeles was also seeking to acquire part of the land comprising the waterworks, the utility involved. The Supreme Court of California held that it was not the function of the Commission to determine the validity of a contract of sale, when contested, nor rights of parties thereunder, nor to com-

pel the owners to sell, these being questions for the courts, not the Commission. [104]

Otter Tail Power Co. v. Clark, *supra*, was a North Dakota case where the state law concerning the sale of a public utility is similar to that of California. The litigants were the buyer and seller of a public utility, the facts of the litigation were lengthy and involved, but briefly, the buyer had paid the seller full purchase price, taken possession of and operated the utility, and about two years later it was first discovered that permission for the sale was not obtained from the Railroad Commission as the law required, and the seller in bad faith and in the fraud of buyer's right sought to take advantage of this omission, and the court held that under the facts he was estopped from questioning the buyer's title to the property and enjoined him from interfering therewith. The case involved fraud, estoppel and other issues wholly foreign to the pending case and its rationale fails to support petitioner's contention.

In conflict with petitioner's contention is the doctrine announced in a later California case, Slater v. Shell Oil Company (1940), 39 C.A. 2, 103 Pac. (2d) 1043, from which we quote (at p. 1050):

It is to be noted that this provision [Sec. 51(a)] declares every transfer without consent of the Railroad Commission is void. That the section means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee, and that

third persons may raise this defense, is clearly established by the following cases: Webster Mfg. Co. v. Byrnes, 207 Cal. 630, 280 Cal. 101; Crum v. Mt. Shasta Power Corp., 220 Cal. 295, 30 P. 2d 30; Napa Valley E. Co. v. Calistoga E. Co., 38 Cal. App. 477, 176 P. 699.

We do not agree with petitioner that the recital contained in the engineer's report to the Railroad Commission in 1943, that the bus lines had been operated as a partnership since June 1, 1942, is of any probative value here in determining the effective date of the sale. This was merely an [105] opinion not binding here. Furthermore, the only question then involved before the Commission was the determination of rates to be charged by the partnership, which was then unquestionably the operating owner.

Not only the law of California prevented the consummation of the sale until it was authorized by the Commission, but likewise the contract of sale and the resolution of the corporation authorizing same both expressly stipulated that it was made "subject to the approval of the Railroad Commission"; the contract of sale further stated that "in the event said approval is not forthcoming this agreement will be null and void and of no effect." Accordingly, the sale could not be completed either under the law of California or the contract of the parties until approval by the Railroad Commission was had, and profits earned prior thereto in the bus lines operation belonged to peti-

tioner corporation and is taxable to it. See *Lucas v. North Texas Lumber Company* (1930), 281 U. S. 11; *Michigan Steel Corporation of New Jersey* (1938), 38 B.T.A. 435; *Albert E. Dyke* (1946), 6 T. C. 1134; *Portland Furniture Mfg. Co.*, B.T.A. 878.

Petitioner's final contention is that the income for the period in dispute cannot be taxed to petitioner corporation because such income was paid to and received by the partnership under a claim of right without restriction as to its disposition, and cites *North American Oil Consolidated v. Burnet*, 286 U. S. 417, and *Commissioner v. Wilcox*, 327 U. S. 404.

This is a novel and we believe an unwarranted application of the well established claim of right theory. The cases cited and all others invoking the rule, so far as we are aware, as respondent points out, are those where the litigant taxpayer receives income without restriction pending settlement of a dispute as to ownership, or where a taxpayer receives illegal income as [106] to which no dispute has been raised, but the taxpayer contends that lack of clear title prevents imposition of taxes thereon by the government.

Such is not the case here, for under the facts we hold that the possession, if any, by the partnership, of the bus line, its properties or profits during the period in question, was held by the partnership as

agent of petitioner corporation which remained the lawful owner of same until September 15, 1942.

The Commissioner did not err, and accordingly, Decisions will be entered for respondent. [107]

The Tax Court of the United States
Washington

Docket No. 11043

HARRY V. SOANES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated January 23, 1948, it is

Ordered and Decided: That there is a liability on the part of this petitioner as transferee of the assets of the Vallejo Bus Company, for declared value excess-profits tax and excess profits tax for the year 1942 in the respective amounts of \$3,074.94 and \$27,721.76, together with interest thereon as provided by law.

Entered Jan. 27, 1948.

[Seal] /s/ LUTHER A. JOHNSON,
Judge. [108]

The Tax Court of the United States
Washington

Docket No. 11044

FRANK O. BELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated January 23, 1948, it is

Ordered and Decided: That there is a liability on the part of this petitioner as transferee of the assets of the Vallejo Bus Company, for declared value excess-profits tax and excess profits tax for the year 1942 in the respective amounts of \$3,074.94 and \$27,721.76, together with interest thereon as provided by law.

Entered Jan. 27, 1948.

[Seal] /s/ LUTHER A. JOHNSON,
Judge. [109]

The Tax Court of the United States
Washington

Docket No. 11045

LUTHER E. GIBSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated January 23, 1948, it is

Ordered and Decided: That there is a liability on the part of this petitioner as transferee of the assets of the Vallejo Bus Company, for declared value excess-profits tax and excess profits tax for the year 1942 in the respective amounts of \$3,074.94 and \$27,721.76, together with interest thereon as provided by law.

Entered Jan. 27, 1948.

[Seal] /s/ LUTHER A. JOHNSON,

Judge. [110]

The Tax Court of the United States
Washington

Docket No. 11046

THE VALLEJO BUS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated January 23, 1948, it is

Ordered and Decided: That there is a deficiency of \$3,074.94 in declared value excess-profits tax and a deficiency of \$27,721.76 in excess profits tax for the year 1942.

Entered Jan. 27, 1948.

[Seal] /s/ LUTHER A. JOHNSON,
Judge. [111]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Vallejo Bus Company, petitioner in this cause, by Leon de Fremery and Clarence E. Musto, counsel, hereby files its petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by The Tax Court of

the United States rendered on January 27, 1948, 10 T. C. (No. 17), determining that there is a deficiency in petitioner's declared-value-excess profits tax for the calendar year 1942 in the amount of \$3,074.94 and a deficiency in petitioner's excess profits tax for the calendar year 1942 in the amount of \$27,721.76.

I.

Petitioner is a dissolved California corporation, the principal office of which was located in the City of Vallejo, California. Petitioner filed its Federal income and excess profits tax returns for the year 1942 with the Collector of Internal Revenue for the First District of California. [127]

II.

The nature of the controversy, set forth briefly, is as follows:

Prior to June 1, 1942, petitioner operated a public utility subject to the jurisdiction of the Railroad Commission of the State of California. Petitioner entered into an agreement, effective June 1, 1942, to sell and transfer its business to a partnership composed of its stockholders, subject to the approval of said Railroad Commission. The sale and transfer was made on June 1, 1942, and the properties were operated by the partnership on and after June 1, 1942. Petitioner duly filed its Federal income and excess profits tax returns for the calendar year 1942 and did not include in the gross income reported thereon the revenues from said business earned on and after June 1, 1942. Said

partnership filed its Federal income tax return for the period June 1, 1942, to December 31, 1942, and included in the gross income reported thereon the revenues from said business for the period June 1, 1942, to December 31, 1942. Respondent herein has determined that the income from the business from June 1, 1942, to September 15, 1942, must be included in the gross income of petitioner and taxed to it solely because said Railroad Commission failed to issue its order approving said sale and transfer until September 15, 1942. The decision of The Tax Court of the United States decided said controversy in favor of respondent. Petitioner desires to obtain a review of said decision by the United States [128] Circuit Court of Appeals for the Ninth Circuit.

/s/ LEON DE FREMERY,
/s/ CLARENCE E. MUSTO,
Attorneys for Petitioner.

[Endorsed]: Filed April 26, 1948. [129]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR RE-
VIEW AND PROOF OF PERSONAL SERV-
ICE THEREOF

To Charles Oliphant, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.:

You Are Hereby Notified that petitioner, on the
26th day of April, 1948, filed with the Clerk of The

Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States rendered on January 27, 1948, in the above-entitled cause. A copy of the petition for review as filed is attached hereto and served upon you.

Dated at San Francisco, California, this 19th day of April, 1948.

Respectfully,

/s/ LEON DE FREMERY,

/s/ CLARENCE E. MUSTO,

Counsel for Petitioners. [130]

Personal service of the foregoing notice, together with a copy of the petition for review is hereby acknowledged this 27th day of April, 1948.

/s/ CHARLES OLIPHANT, CAR

Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed April 27, 1948. [131]

[Title of Tax Court and Cause.]

STATEMENT OF POINTS RELIED UPON

Vallejo Bus Company, petitioner in this cause, by Leon de Fremery and Clarence E. Musto, counsel, hereby sets forth the following statement of points relied upon by petitioner on review of this cause by the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective between the parties thereto, under the law of the State of California, until the Railroad Commission of the State of California issued its order on September 15, 1942.

2. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, under the law of the State of California, to render the revenues of the business taxable to the partnership until the Railroad Commission of the State of California issued its order on September 15, 1942.

3. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, [141] as between the parties thereto, under the terms and conditions of the contract of sale and under petitioner's resolution authorizing said contract, until approval by the Railroad Commission of the State of California was obtained on September 15, 1942.

4. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, under the terms and conditions of the contract of sale and under petitioner's resolution authorizing said contract, to render the revenues of the business taxable to the partnership until approval by the Railroad Commission of the State of California was obtained on September 15, 1942.

5. The Tax Court of the United States erred

in failing to consider that the Railroad Commission of the State of California, in its decision dated March 23, 1943, fixing the rates to be charged by the partnership, found as a fact that the bus business had been operated as a partnership since June 1, 1942, and that in computing a fair rate of return said Railroad Commission took into consideration the return realized during the calendar year 1942, which return was computed by allowing as a deduction corporate income taxes for the period January 1, 1942, to May 31, 1942, and individual income taxes of the partners for the period June 1, 1942, to December 31, 1942, which individual taxes were computed on the assumption that the partners had no other source of income. In fixing said fair rate of return, said Railroad Commission considered facts contained in its own engineer's report, which report noted on its face that said Railroad Commission's order approving the sale and transfer of petitioner's bus business had not been issued by said [142] Railroad Commission until September 15, 1942.

6. The Tax Court of the United States erred in failing to decide that the receipt of income by the partnership from the operation of the bus business between June 1, 1942, and September 15, 1942, under a claim of right and without restriction as to its disposition, had the legal effect of making such income taxable to the partnership and hence not taxable to petitioner.

7. The Tax Court of the United States erred in deciding that possession of the income from the operation of the bus business for the period June 1, 1942, to September 15, 1942, by the partnership was possession by said partnership as agent of petitioner and that hence petitioner remained the lawful owner of the income until September 15, 1942.

/s/ LEON DE FREMERY,
/s/ CLARENCE E. MUSTO,
Attorneys for Petitioner.

ACKNOWLEDGMENT OF SERVICE

Personal service of a copy of the foregoing statement of points relied upon by petitioner is hereby acknowledged as having been made this 27th day of April, 1948.

/s/ CHARLES OLIPHANT, CAR
Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed April 27, 1948. [143]

The Tax Court of the United States
Washington

Docket No. 11046

VALLEJO BUS COMPANY (a dissolved California corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 11043

HARRY V. SOANES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 11044

FRANK O. BELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 11045

LUTHER E. GIBSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the fore-

going pages, 1 to 146, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of May, 1948.

[Seal] /s/ VICTOR S. MERSCH, EMT
Clerk, The Tax Court of the United States.

[Endorsed]: No. 11941. United States Circuit Court of Appeals for the Ninth Circuit. Harry V. Soanes, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Frank O. Bell, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Luther E. Gibson, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Vallejo Bus Company (a dissolved California Corporation), Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petitions to Review Decisions of The Tax Court of the United States.

Filed May 28, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 11941

HARRY V. SOANES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FRANK O. BELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

LUTHER E. GIBSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

VALLEJO BUS COMPANY (a dissolved Cali-
fornia corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION

Come now the petitioners in the above entitled cause, by their attorneys Leon de Fremery and Clarence E. Musto, and respectfully move that this

Court order that all four petitions for review be consolidated for hearing and that only those papers filed on behalf of petitioner Vallejo Bus Company and the decisions of the Tax Court in the Soanes, Bell and Gibson cases be printed as the transcript of record on these four petitions for review.

In support of this motion, petitioners respectfully show to the Court that petitioners and respondent, by their respective counsel, have entered into a stipulation, which is filed herewith, that petitioners Harry V. Soanes, Frank O. Bell and Luther E. Gibson are transferees of the assets of petitioner Vallejo Bus Company and the decision in their cases will be governed by the decision in the case of petitioner Vallejo Bus Company since the liability asserted against the transferees is the liability of petitioner Vallejo Bus Company.

Dated June .., 1948.

/s/ LEON DE FREMERY,
/s/ CLARENCE E. MUSTO,
Attorneys for Petitioners.

So Ordered:

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed July 12, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD

1. Petitioners above named hereby adopt the Statement of Points Relied Upon filed by petitioner Vallejo Bus Company with The Tax Court of the United States with its Petition for Review of this cause.

2. Petitioners hereby designate that only the following parts of the record be included in the printed transcript of this cause:

(a) Docket entries of all proceedings before the Tax Court of Vallejo Bus Company case;

(b) All pleadings of Vallejo Bus Company case;

(c) The complete stipulation of facts and exhibits attached thereto;

(d) The following excerpts from exhibits not attached to the stipulation of facts but received in evidence by the Tax Court at the hearing:

(1) Petitioners' "Exhibit 1" in its entirety;

(2) Excerpts from petitioners' "Exhibit 2":

The cover page addressed to Mr. Warren K. Brown and signed by Homer H. Grant; from page 1, the caption "Scope of Investigation" and the paragraph thereunder; from pages 3, 4 and 5, title and paragraphs 1 through 5 of section entitled "Development of Transit Company"; from page 10, title and paragraphs 1 and 2 of section entitled "Income Tax";

(e) Findings of fact and opinion of the Tax Court;

(f) Decisions of the Tax Court in Vallejo Bus Company case; and in the Soanes, Bell and Gibson cases;

(g) Petition for review of Vallejo Bus Company case;

(h) Notice of filing of petition for review and proof of personal service thereof of Vallejo Bus Company case;

(i) Statement of points relied upon of Vallejo Bus Company case;

(j) This statement of points relied upon and designation of record.

Said transcript to be prepared, certified and printed as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 2, 1948.

/s/ LEON DE FREMERY,

/s/ CLARENCE E. MUSTO,

Attorneys for Petitioners.

ACKNOWLEDGMENT OF SERVICE

Personal service of a copy of the foregoing Statement of Points Relied Upon and Designation of Record is hereby acknowledged as having been made this 2nd day of July, 1948. Said Designation of Record is hereby agreed to.

/s/ THERON L. CAUDLE,

Assistant Attorney General,

Attorney for Respondent.

[Endorsed]: Filed July 12, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys, as follows:

1. That the petitioners Harry V. Soanes, Frank O. Bell and Luther E. Gibson are transferees of the assets of the petitioner Vallejo Bus Company and as such are liable for such deficiencies of taxes of petitioner Vallejo Bus Company for the year 1942, together with interest thereon, as provided by law, as may be determined in this proceeding.

2. That the decision in the cases of petitioners Harry V. Soanes, Frank O. Bell and Luther E. Gibson will be governed by the decision of this Court in the companion and controlling case of petitioner Vallejo Bus Company now pending decision in this Court since the liability asserted against the transferees is the liability of petitioner Vallejo Bus Company.

3. That because of the reasons set out, and the agreements reached in paragraphs 1 and 2 herein:

(a) The statement of points relied upon on review by above named petitioner Vallejo Bus Company and filed with The Tax Court of the United States shall also apply to the other three above named petitioners, and the same is hereby adopted;

(b) Only one printed record shall be prepared in the United States Circuit Court of Appeals for

the Ninth Circuit, which shall be entitled in the names of all four petitioners, which record shall contain the complete transcript of record pertaining to above named petitioner Vallejo Bus Company as designated to the Clerk of said Circuit Court of Appeals; and also the decisions of the Tax Court in each of the Soanes, Bell and Gibson cases.

(c) The four cases be consolidated for briefing, argument, hearing and decision.

Dated July 2, 1948.

/s/ LEON DE FREMERY,

/s/ CLARENCE E. MUSTO,

Attorneys for Petitioners.

/s/ THERON L. CAUDLE,

Assistant Attorney General,

Attorney for Respondent.

So Ordered:

.....

United States Circuit Judge.

[Endorsed]: Filed July 12, 1948. Paul P. O'Brien, Clerk.

No. 11,941

IN THE

United States Court of Appeals
For the Ninth Circuit

HARRY V. SOANES,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FRANK O. BELL,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

LUTHER E. GIBSON,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

VALLEJO BUS COMPANY (a dissolved California corporation),

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

FILED

SEP - 2 1948

PAUL P. O'BRIEN,

LEON DE FREMERY,

CLARENCE E. MUSTO,

Crocker Building, San Francisco 4, California,

Attorneys for Petitioner.

Subject Index

	Page
Statement of jurisdiction	2
Statement of the case	2
Question for decision	9
Statement of points relied upon	9
Summary of argument	11
Argument	12
I. The date on which the Railroad Commission promul- gated its approval of said sale and transfer is not material in determining the effective date of said sale and transfer	12
II. As an additional argument petitioner contends that the income for the period in question cannot be taxed to the petitioner but must be taxed to the partnership because said income on and after June 1, 1942 was re- ceived by said partnership under a claim of right and without restriction as to its disposition	25
Conclusion	29

Table of Authorities Cited

Cases	Pages
Akers v. Seofield, 167 F.2d 718 (1948)	28, 29
Boston American League Baseball Club, 3 B.T.A. 149 (1925)	22
Hanlon v. Eshleman, 169 Cal. 200; 146 Pac. 656 (1915)....	13, 14
Jacobs v. Hoey, 136 F.2d 954 (1943); cert. den. 320 U. S. 790	27
North American Oil Consolidated v. Burnet, 286 U. S. 417 (1932)	25, 26, 29
Otter Tail Power Co. v. Clark, 59 N. E. 320; 229 N. W. 915 (1930)	15, 17, 19, 20
Sale v. Railroad Commission, 15 Cal. (2d) 612; 104 Pac. (2d) 38 (1940)	14
Seattle Renton Lumber Company v. United States, 135 F.2d 989 (1943)	23, 24
Vallejo Bus Co., In re, 44 C.R.C. 627 (1943).....	17
Wileox, Commissioner of Internal Revenue v., 327 U. S. 404 (1946)	26, 27, 28, 29

Textbooks

23 American Jurisprudence, Section 36	14, 19
---------------------------------------------	--------

Statutes

General Laws of the State of California:	
Public Utilities Act 6386, Section 501	12, 14
Public Utilities Act 6386, Section 51(a)	12, 13, 14, 15
Internal Revenue Code (Title 26, U.S.C.), Section 22(a)...	2, 29
Laws of North Dakota, 1919, C. 192 §21, Section 4609 C. 21 Supplement	16, 20

No. 11,941

IN THE
United States Court of Appeals
For the Ninth Circuit

HARRY V. SOANES,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

FRANK O. BELL,

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COMMISSIONER OF INTERNAL REVENUE.

Respondent.

LUTHER E. GIBSON,

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VS.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

VALLEJO BUS COMPANY (a dissolved California corporation),

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

PETITIONERS' OPENING BRIEF.

STATEMENT OF JURISDICTION.

*To the Honorable William Denman, Presiding Judge, and
to the Honorable Associate Judges of the United
States Circuit Court of Appeals for the Ninth Circuit:*

On May 27, 1946, petitioner Vallejo Bus Company filed its petition with the Tax Court of the United States for a redetermination of deficiencies of its declared value excess profits tax and excess profits tax for the calendar year 1942 (R. 3). On said date petitioners Soanes, Bell and Gibson also filed their petitions with the Tax Court of the United States for a redetermination of the deficiencies and transferee liability for the calendar year 1942 of said petitioners as transferees of the assets of petitioner Vallejo Bus Company (R. 1). On January 27, 1948, the Tax Court entered its decision that there was a deficiency of \$3,074.94 in declared value excess profits tax and a deficiency of \$27,721.76 in excess profits tax for the calendar year 1942 for petitioner Vallejo Bus Company (R. 61). On said date the Tax Court also entered its decisions that petitioners Soanes, Bell and Gibson were liable for said deficiencies as transferees of the assets of petitioner Vallejo Bus Company (R. 58, 59, 60). These cases are brought to this Court by Petitions for Review filed April 26, 1948, in accordance with sections 1141 and 1142, Internal Revenue Code (Title 26, U. S. C.) (R. 61).

STATEMENT OF THE CASE.

These four cases involve a dissolved corporation and its three transferee stockholders. The parties hereto have stipulated that petitioners Soanes, Bell and Gibson are liable for such deficiencies of taxes of petitioner Vallejo

Bus Company for the calendar year 1942, together with interest thereon as provided by law, as may be determined in this proceeding (R. 74). The parties have further stipulated that the decision in the cases of petitioners Soanes, Bell and Gibson will be governed by the decision of this Court in the companion and controlling case of petitioner Vallejo Bus Company, since the liability asserted against the transferees is the liability of petitioner Vallejo Bus Company (R. 74). The parties have stipulated that the four cases be consolidated for briefing, arguing, hearing and decision (R. 75). Accordingly, the term "petitioner" as hereinafter used will refer solely to petitioner Vallejo Bus Company unless specific reference is made to the other petitioners.

The facts which are the same in all four proceedings were submitted upon a stipulation and exhibits which the Tax Court adopted as findings of fact (R. 50). The pertinent portions of the facts are as follows:

1. Petitioner was incorporated under the laws of the State of California on July 3, 1936. Petitioner's principal business was the operation of certain bus lines in the City of Vallejo, California, and adjoining territory. Petitioner was an active operating public utility under the jurisdiction of the Railroad Commission of the State of California, and held a certificate of necessity issued by said Commission dated May 6, 1941. During all the times hereinafter mentioned the entire issued and outstanding capital stock of petitioner was owned as follows:

Luther E. Gibson	100
Frank O. Bell	100
Harry V. Soanes	200

(R. 15, 16).

2. On or before May 19, 1942, Luther E. Gibson, Frank O. Bell and Harry V. Soanes entered into an oral partnership agreement for the purpose of acquiring and operating the bus lines then owned and operated by petitioner. The interests in the capital and profits of said partnership were as follows:

Luther E. Gibson	$\frac{1}{4}$
Frank O. Bell	$\frac{1}{4}$
Harry V. Soanes	$\frac{1}{2}$

(R. 16).

On November 12, 1942, said oral partnership agreement was reduced to writing (R. 16, 20). On May 19, 1942, said partnership, doing business under the firm name and style of Vallejo Bus Co., offered to purchase the operative rights of petitioner and all petitioner's assets except four Reo Buses for the sum of \$29,937.20 (R. 16, 17).

3. At a special meeting of the Board of Directors of petitioner held on May 19, 1942, said offer of said partnership was accepted (R. 17). At said special meeting a resolution was voted and unanimously approved, which read in part as follows:

“Be it resolved: That the offer made to this Corporation by Luther E. Gibson, Harry V. Soanes and Frank O. Bell, Co-Partners doing business under the firm name and style of The Vallejo Bus Co. to purchase the operative rights of the Corporation and all of the assets of the Corporation save and except four Reo Busses * * * for the sum of \$29937.20 be and the same is hereby accepted; and that the sale and transfer of said operative rights and assets be effective as of the 1st day of June, 1942, subject to the approval of the Railroad Commission of the State of California, * * *” (R. 24, 25).

4. Said partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of said business on and after that date were deposited in said bank account (R. 17).

5. On or about June 11, 1942, endorsements were requested with respect to all policies of insurance issued to petitioner naming as assured on said policies Luther E. Gibson, Harry V. Soanes and Frank O. Bell, doing business as Vallejo Bus Co. Said endorsements were made by the insurers and were effective on or before June 11, 1942 (R. 17).

6. Petitioner and said partnership entered into an agreement dated June 9, 1942 (R. 17). Said agreement was “* * * by and between Vallejo Bus Company, a corporation, as Seller, and Luther E. Gibson, Harry V. Soanes and Frank O. Bell, co-partners doing business under the firm name and style of Vallejo Bus Co., as Buyers; * * *” (R. 26). Said agreement provided in part as follows:

“That said Seller agrees to sell unto said Buyers and said Buyers agree to buy of and from said Seller, the following described personal property, to wit:

“Being the following busses, to wit:

[Here was listed 18 vehicles.]

“Also, all machinery, tools and equipment, furniture and fixtures, transportation equipment including coin boxes, all business fixtures and improvements to the premises from which the business of said Seller is operated, together with materials and supplies therein contained, and prepaid insur-

ance; also all franchises and operating rights of the said Seller.

“TO HAVE AND TO HOLD the same unto said Buyers for the sum of TWENTY-NINE THOUSAND NINE HUNDRED THIRTY-SEVEN and 20/100 (\$29,937.20) DOLLARS, in lawful money of the United States of America, receipt of which is hereby acknowledged by the said Seller.

“IT IS UNDERSTOOD AND AGREED that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, * * *” (R. 26, 27).

Said agreement of June 9, 1942, reduced to writing the offer and acceptance made by petitioner and the partnership on May 19, 1942 (Cf. R. 23, 26).

7. On June 9, 1942, petitioner filed a petition with the Railroad Commission of the State of California requesting the Commission to approve the sale and transfer of its assets (R. 17, 18). A copy of petitioner's written agreement of June 9, 1942, was attached to said petition to the Railroad Commission (R. 28, 30). On September 15, 1942, said Commission issued its order granting the application of petitioner and authorizing the transfer of the properties described in said agreement of June 9, 1942 (R. 18, 33).

8. On February 4, 1943, an investigation into the reasonableness of the fares of Vallejo Bus Co., the partnership, was instituted by the Commission on its own motion

after a preliminary survey of the situation and recommendation by the staff. Public hearings were held in Vallejo on March 3, 1943, and March 10, 1943 (R. 35). At said hearings a report was presented by the Commission's Transportation Research Engineer and said report was considered by the Commission along with the rest of the evidence in reaching its decision concerning a reasonable rate (R. 35, 36). Said report read in part as follows:

"On June 1, 1941, Luther E. Gibson, Harry B. [V.] Soanes, and Frank O. Bell, acquired the corporate stock of the Vallejo Bus Company and took over the management. On June 19, 1942, Vallejo Bus Company (a corporation) filed Application No. 25072 to sell its operative rights and property to the Vallejo Bus Company, a partnership consisting of Mr. Gibson, Mr. Soanes, and Mr. Bell. The present proportion of ownership, we understand, is as follows: Soanes, 50 per cent; Gibson, 25 per cent; and Bell, 25 per cent. This application was granted under Decision No. 35777, dated September 15, 1942." (R. 47).

Said report also contained the following language concerning the Federal income tax allowable as an expense in computing a reasonable rate:

"Income Tax

Income taxes computed herein are based on the actual type of organization of the company. In other words, the first five months of 1942, are computed on a corporation basis and remaining months are on a partnership basis." (R. 48).

On March 23, 1943, the Commission rendered its decision setting a reasonable rate (R. 42, 43). Said decision contained the following finding of fact:

“Since June 1, 1941, the company has been owned by Luther E. Gibson, President, Harry B. [V.] Soanes, Vice President, and Frank O. Bell, Manager, having control relationships of 25 per cent, 50 per cent, and 25 per cent, respectively. The company operated as a corporation until June 1, 1942, after which time it became a partnership.” (R. 37).

9. Petitioner was dissolved on December 31, 1942. Petitioner filed its income tax return for the calendar year 1942 with the Collector of Internal Revenue for the First District of California and reported therein income from the operation of said bus lines for the period January 1, 1942, to May 31, 1942. Said partnership filed its income tax return with the Collector of Internal Revenue for the First District of California and reported therein income from the operation of said bus lines for the period June 1, 1942, to December 31, 1942. The Commissioner has taxed to petitioner income from the operation of said bus lines for the period June 1, 1942, to September 15, 1942. The only issue in controversy is whether the Commissioner erred in making this adjustment (R. 18, 19). The Commissioner is asserting said adjustment solely because the Railroad Commission did not issue its order approving the transfer of petitioner's business until September 15, 1942.

QUESTION FOR DECISION.

The sole question at issue in these consolidated cases may be stated as follows:

Where a corporation operating a public utility subject to the jurisdiction of the Railroad Commission of the State of California enters into an agreement prior to June 1, 1942, to take effect on that date, to sell the business to a partnership composed of its stockholders, subject to the approval of said Commission, and where the transfer is made on June 1, 1942, and where the properties are operated by the partnership on and after June 1, 1942, must the income from the business for the period June 1, 1942, to September 15, 1942, be taxed to the corporation solely because the Commission did not issue its order approving the transfer until September 15, 1942?

STATEMENT OF POINTS RELIED UPON.

1. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective between the parties thereto, under the law of the State of California, until the Railroad Commission of the State of California issued its order on September 15, 1942 (R. 65).

2. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, under the law of the State of California, to render the revenues of the business taxable to the partnership until the Railroad Commission of the State of California issued its order on September 15, 1942 (R. 65).

3. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, as between the parties thereto, under the terms and conditions of the contract of sale and under petitioner's resolution authorizing said contract, until approval by the Railroad Commission of the State of California was obtained on September 15, 1942 (R. 65).

4. The Tax Court of the United States erred in deciding that the sale and transfer of petitioner's business was ineffective, under the terms and conditions of the contract of sale and under petitioner's resolution authorizing said contract, to render the revenues of the business taxable to the partnership until approval by the Railroad Commission of the State of California was obtained on September 15, 1942 (R. 65).

5. The Tax Court of the United States erred in failing to consider that the Railroad Commission of the State of California, in its decision dated March 23, 1943, fixing the rates to be charged by the partnership, found as a fact that the bus business had been operated as a partnership since June 1, 1942, and that in computing a fair rate of return said Railroad Commission took into consideration the return realized during the calendar year 1942, which return was computed by allowing as a deduction corporate income taxes for the period January 1, 1942, to May 31, 1942, and individual income taxes of the partners for the period June 1, 1942, to December 31, 1942, which individual taxes were computed on the assumption that the partners had no other source of income. In fixing said fair rate of return, said Railroad Commission considered facts contained in its own engineer's report, which re-

port noted on its face that said Railroad Commission's order approving the sale and transfer of petitioner's bus business had not been issued by said Railroad Commission until September 15, 1942 (R. 65, 66).

6. The Tax Court of the United States erred in failing to decide that the receipt of income by the partnership from the operation of the bus business between June 1, 1942, and September 15, 1942, under a claim of right and without restriction as to its disposition, had the legal effect of making such income taxable to the partnership and hence not taxable to petitioner (R. 66).

7. The Tax Court of the United States erred in deciding that possession of the income from the operation of the bus business for the period June 1, 1942, to September 15, 1942, by the partnership was possession by said partnership as agent of petitioner and that hence petitioner remained the lawful owner of the income until September 15, 1942 (R. 67).

SUMMARY OF ARGUMENT.

I. The date on which the Railroad Commission promulgated its approval of said sale and transfer is not material in determining the effective date of said sale and transfer.

II. As an additional argument petitioner contends that the income for the period in question cannot be taxed to the petitioner but must be taxed to the partnership because said income on and after June 1, 1942, was received by said partnership under a claim of right and without restriction as to its disposition.

ARGUMENT.

I.

THE DATE ON WHICH THE RAILROAD COMMISSION PROMULGATED ITS APPROVAL OF SAID SALE AND TRANSFER IS NOT MATERIAL IN DETERMINING THE EFFECTIVE DATE OF SAID SALE AND TRANSFER.

Concerning points 1, 2 and 5 relied upon by petitioner (set forth herein at pages 9-10), petitioner shows as follows:

Petitioner's principal business was the operation of certain bus lines in the City of Vallejo, California, and adjoining territory. Petitioner was an active operating public utility under the jurisdiction of the Railroad Commission of the State of California (R. 16) and subject to the Public Utilities Act of said State. Because petitioner was subject to the Public Utilities Act respondent concludes that petitioner's otherwise valid sale and transfer of June 1, 1942, was a nullity as between the parties and of no effect whatsoever until said nullity was vitalized by the approval of the Railroad Commission on September 15, 1942.

In this connection respondent relies upon Sections 501 $\frac{1}{4}$ and 51(a) of the Public Utilities Act of California, 6386, the pertinent parts of which are as follows:

"§ 501 $\frac{1}{4}$. OPERATION OF PASSENGER STAGES: * * * Any right, privilege, franchise or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the Railroad Commission. * * *" (Added by Stats. 1927, p. 74.)

"§ 51. SELLING, LEASING, ETC., OF PUBLIC UTILITIES: * * * (a) No public utility shall henceforth sell, * * *

or otherwise dispose of or encumber the whole or any part of its * * * plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, * * * with out first having secured from the railroad commission an order authorizing it so to do. Every such sale, lease, assignment, * * * made other than in accordance with the order of the commission authorizing the same shall be void. * * *” (Stats. 1915, p. 115.)

Because of the foregoing provisions of the Public Utilities Act requiring the approval of sales by the Railroad Commission, particularly the provisions of Section 51(a) providing that a sale made other than in accordance with an order of the Commission is void, respondent has apparently concluded that the sale and transfer of June 1, 1942, was a nullity *as between the parties* until the approval of the Railroad Commission on September 15, 1942. The respondent apparently further concludes that during this period of time the income must therefore be taxed to the vendor although it was actually received and retained by the vendees. It is petitioner’s contention that the sale of June 1, 1942, was valid on that date *as between the parties thereto* since the Railroad Commission had no authority concerning this sale other than its statutory authority to veto the sale if it should be found contrary to the interests of the public. It was so held by the Supreme Court of California in the leading case of *Hanlon v. Eshelman*, 169 Cal. 200, 202; 146 Pac. 656 (1915), in which the Court defined the Commission’s power as follows:

“* * * *The commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone.* * * * With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. * * *

” (Italics added.)

See also the case of *Sale v. Railroad Commission*, 15 Cal. (2d) 612, 620; 104 Pac. (2d) 38 (1940), in which the Supreme Court of California has lately affirmed and restated the principle of *Hanlon v. Eshleman*, supra, quoted above. It seems clear, therefore, that Sections 501 $\frac{1}{4}$ and 51(a) of the Public Utilities Act, as consistently interpreted by the Supreme Court of California, do not go so far as to divest a public utility of its entire power of sale, but merely give to the Railroad Commission the power to invalidate a sale found to be contrary to the public interest. Moreover, the principle stated in *Hanlon v. Eshleman*, supra, and the corollary which follows therefrom are in accordance with the rule, stated in 23 Am. Jur., *Franchises*, Section 36, concerning the unauthorized transfer of a public utility franchise:

“Generally, an unauthorized transfer of a public utility franchise is no ipso facto void; *on the contrary, the transfer will be treated ordinarily, as valid and effectual* until attacked by the sovereign grantor

in a direct proceeding instituted for the purpose.
 * * *” (Italics added.)

It follows, therefore, that a particular sale by a public utility is *not void in its entirety* prior to approval, and the parties thereto can create valid rights and liabilities *as between each other*, subject only to a subsequent disapproval in the public interest.

There appear to be no California cases in which the validity of an unauthorized sale by a public utility has been directly in issue. However, the Supreme Court of North Dakota has passed squarely upon this point, and has ruled that a sale by a public utility of all its assets was valid and enforceable prior to approval by the Railroad Commission of said state. This case is cited as good authority for the same proposition under California law since the applicable section of the North Dakota Public Utilities Act is practically identical with Section 51(a) of the California Act.

The North Dakota case referred to is *Otter Tail Power Co. v. Clark*, 59 N. D. 320; 229 N. W. 915 (1930). In this case defendant was the owner of a power company which he sold to plaintiff in 1925. Plaintiff then leased the company back to defendant. Neither plaintiff nor defendant obtained the approval of the Railroad Commission for this sale of a public utility, which permission was required by the Public Utilities Act of North Dakota. To facilitate comparison, the pertinent parts of Section 51(a) of the California Public Utilities Act are repeated below alongside the applicable portion of the Public Utilities Act of North Dakota:

**Public Utilities Act of
North Dakota.**

“No public utility shall hereafter sell * * * or otherwise dispose of * * * its franchise, works or system, necessary or useful in the performance of its duties to the public * * * without first having secured from the Commissioners an order authorizing it to do so. Every such sale * * * made, other than in accordance with the order of the Commissioners authorizing the same, shall be void.” Laws 1919, C. 192, § 21, section 4609 C. 21 Supplement.

**Public Utilities Act
of California.**

“No public utility shall henceforth sell, * * * or otherwise dispose of * * * the whole or any part of its * * * plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, * * * without first having secured from the railroad commission an order authorizing it so to do. Every such sale, * * * made other than in accordance with the order of the commission authorizing the same shall be void.”

In 1927 defendant went out of possession and plaintiff took possession of the system. About this time plaintiff decided to sell the system to a third party, but could not do so since plaintiff had never received permission to purchase the system. Defendant refused to join with plaintiff in an application to the Railroad Commission of North Dakota to approve the sale.

Plaintiff, as vendee of the original sale, and in his own name, then petitioned the Railroad Commission to approve the sale made in 1925. The Railroad Commission *dismissed* plaintiff's petition on the grounds first that the vendor had not joined in the application, and second that plaintiff sought the *ratification of a completed sale and transfer*.

Plaintiff then instituted the present suit in equity and prayed that defendant be required to join in an applica-

tion to the Railroad Commission for approval of the sale. The trial court entered judgment for plaintiff and ruled *that plaintiff was the owner of the property in question as against the defendant*, subject only to such rights and limitations as the public may have *and assert*. The trial court further ordered that defendant be restrained from interfering with plaintiff's possession. On appeal, the Supreme Court of North Dakota affirmed the judgment in its entirety, although *at no time had the sale been authorized by the Railroad Commission*. Moreover, in its opinion the court cited and quoted at length from the California case of *Hanlon v. Eshleman*, *supra*, as correctly stating the extent of the powers of the Railroad Commission of North Dakota.

This North Dakota case stands for the principle that as between the purchaser and seller of a public utility, the purchaser is the owner of the property even though the sale did not receive the approval of the Railroad Commission as provided by statute. Accordingly, under authority of the *Otter Tail Power Co.* case, *supra*, petitioner concludes that the sale from the Vallejo Bus Company to the partnership was valid as between the parties on and after June 1, 1942. The subsequent approval of the Railroad Commission merely ratified the sale as not being contrary to the interests of the public.

The aforesaid conclusion receives further support in an officially reported decision of the Railroad Commission of California itself, *In re Vallejo Bus Co.*, 44 C.R.C. 627 (1943). During the year 1943 the Commission rendered its decision in a case to establish new rates for the partnership herein. The Commission, on its own motion, made

an investigation into the reasonableness of the rates being charged by the partnership. A public hearing was held, at which an extensive report concerning the operation of the bus lines was presented by the Commission's own Transportation Research Engineer. A copy of this report was admitted into evidence by the Tax Court as "Petitioner's Exhibit No. 2" (R. 44). The Commission considered this report along with other evidence in rendering its aforesaid decision as to a reasonable rate. A copy of this decision was admitted into evidence by the Tax Court as "Petitioner's Exhibit No. 1" (R. 35). Petitioner contends that said decision and report are material in ascertaining the effect of the Commission's order of September 15, 1942, since they clearly show the interpretation placed by the Commission itself upon the effect of its order upon the sale in question herein.

The Engineer's report contains the following pertinent statements:

"On June 1, 1941, Luther E. Gibson, Harry B. [V.] Soanes, and Frank O. Bell acquired the corporate stock of the Vallejo Bus Company and took over the management. On June 19, 1942, Vallejo Bus Company (a corporation) filed Application No. 25072 to sell its operative rights and property to the Vallejo Bus Company, a partnership consisting of Mr. Gibson, Mr. Soanes, and Mr. Bell. The present proportion of ownership, we understand, is as follows: Soanes, 50 per cent; Gibson, 25 per cent; and Bell, 25 per cent. This application was granted under Decision No. 35777, dated September 15, 1942." (R. 47).

After thus specifically pointing out that the application was not granted until September 15, 1942, the Engineer,

nevertheless, makes the following statement with respect to the amount of income taxes allowable as an expense in computing a reasonable rate:

“Income Tax

Income taxes computed herein are based on the actual type of organization of the company. *In other words, the first five months of 1942, are computed on a corporation basis and remaining months are on a partnership basis.*” (R. 48; italics added).

The report contains a schedule showing the amount of income taxes allowed as an expense and this same schedule is repeated in the Commission’s decision (R. 39). It is thus apparent that the Commission in determining the amount of income taxes allowable as expense, calculated the tax for the first five months, to June 1, 1942, on the corporate basis and for the balance of the year on the partnership basis. Moreover, the Commission’s decision contains the following finding of fact:

“Since June 1, 1941, the company has been owned by Luther E. Gibson, President, Harry B. [V.] Soanes, Vice President, and Frank O. Bell, Manager, having control relationships of 25 per cent, 50 per cent, and 25 per cent, respectively. *The Company operated as a corporation until June 1, 1942, after which time it became a partnership.*” (R. 37; italics added.)

The *Otter Tail Power Co.* case, *supra*, follows and applies the principle stated in *American Jurisprudence*, *supra*, that prior to approval or disapproval of the Railroad Commission a sale of a public utility is valid and legally binding *as between the parties thereto* under the

Public Utilities Act of North Dakota. Moreover, the *Vallejo* rate case, *supra*, applies this principle to the transaction in question herein. The governing statutes for the *Otter Tail* transaction and for the Vallejo Bus transaction are virtually identical. Therefore, as between the parties, this transaction must be effective, under the law of the State of California, on June 1, 1942, the date on which the bargain was struck.

Concerning points 3 and 4 relied upon by petitioner (set forth herein at page 19), petitioner shows as follows:

A conclusion different from that noted above could be reached only if the parties to the Vallejo Bus transaction had intended the sale to be effective as of some other date. However, the following examination of the facts in the Vallejo Bus transaction clearly establishes that the parties *intended* the sale and transfer to be effective as of June 1, 1942 and that the necessary documents were drawn up accordingly. Prior to June 1, 1942, to wit, on May 19, 1942, petitioner's three stockholders formed a partnership for the *specific purpose* of acquiring and operating the bus lines on and after June 1, 1942 (R. 16). Moreover, on May 19, 1942, said partnership offered to purchase, and petitioner agreed to sell the assets in question for a specified sum (R. 16, 17). At that time it was definitely stated that said sale and transfer was to be effective on June 1, 1942, subject to the approval of the Railroad Commission, and this was noted in the minutes of petitioner's directors' meeting (R. 24, 25). On June 1, 1942, the parties to the sales contract completed *substantial performance* of said contract. The partnership opened a bank account in its own name and *all the receipts and*

revenues from the operation of said bus lines were deposited therein (R. 17). It should be noted that *all* the receipts were thus received by the partnership and none by the petitioner. It is evident therefore that on said date the partnership took possession and began operating *all* of the assets of said bus lines. On June 11, 1942, endorsements were requested with respect to all policies of insurance issued to petitioner naming as assured on said policies the partnership and partners. Said endorsements were duly made and were effective on or before said date (R. 17).

Prior thereto, and on June 9, 1942, the parties jointly executed a petition to the Railroad Commission, requesting approval of said sale (R. 17, 18, 28). The details of said sale were set out in writing and said writing was attached as an exhibit to said petition (R. 26, 28). Said exhibit set out the same terms and conditions for said sale and transfer as were agreed upon between the parties on May 19, 1942, and as had then been noted in the minutes of petitioner's directors' meeting. Said writing also provided for the leasing of petitioner's unsold assets to said partnership (R. 27). Among the terms and conditions reiterated in said writing, the following is here emphasized: “* * * that the sale of said personal property hereinabove described *shall be effective as of June 1, 1942* but that same is subject to the approval of the Railroad Commission * * * *and in the event said approval is not forthcoming*, the agreement will be null and void and of no effect, * * *.” (R. 27; italics added.)

It is apparent from the foregoing facts and from the quoted portion of the sales contract that the transfer

became effective on June 1, 1942, and that said transfer was *intended* to be valid and binding, and remain valid and binding as to *all* its terms, until such future time as the Railroad Commission *might* invalidate said sale.

A contract with similar terms was interpreted accordingly in the case of *Boston American League Baseball Club*, 3 B. T. A. 149 (1925). In 1919 Boston agreed to sell Babe Ruth to the Yankees for \$100,000.00. The contract stated that in the event Ruth did *not* report to the Yankees on or before July 1, 1920, the Yankees had the option to cancel the contract. The whole transaction was governed by the rules of the National Base Ball Commission. Rule 28 stated, in part, that in the event a purchased player did *not* duly report to the purchasing club "the agreement * * * shall be *null and void* * * *," and the seller shall return the purchase price to the buyer. (Italics added.) The \$100,000.00 was paid to Boston in 1919 and Ruth duly reported to the Yankees in 1920. Boston contended that the \$100,000.00 was not income until 1920 since if Ruth did not duly report, the contract was *null and void*. The Board of Tax Appeals held, however, that the income was realized in 1919 since the contract of sale was *valid when made* and remained valid until such time as it might be cancelled.

As it happened in the Vallejo Bus transaction, the Railroad Commission not only failed to invalidate the sale, but within the same taxable year, to-wit, on September 15, 1942, signified its approval of said sale *in its entirety* (R. 33). Hence, as in the *Boston American League* case, *supra*, the *invalidating condition never occurred*, the

transfer remained in full force and effect, and the income received prior to approval is taxable to the recipients.

From all of the facts noted above, it is clear that there was a valid sale and transfer to the partnership effective on June 1, 1942, since not only did the parties *intend* the sale to be effective as of said date, but there was *substantial performance on said date* and the remaining performance was thereafter promptly carried out. Under such circumstances the income belonged to the partnership on and after the date of substantial performance, and this Circuit Court of Appeals has so decided in a similar income tax case, *Seattle Renton Lumber Company v. United States*, 135 F. (2d) 989 (1943). In this case (as in the Vallejo Bus transaction) a partnership of the lumber company's stockholders was organized to take over said company's assets and business. At a stockholders' meeting on June 30, 1933, the company deeded its real property to one of the partners as trustee for the partnership, and executed a bill of sale of its personal property to the partnership. After said date the business was operated by the partnership, bank accounts were opened by the partnership, and the name on the mill, trucks, and letterheads was changed to that of the partnership. *No formal articles of partnership were drawn up nor certificate of assumed name filed. The deed, declaration of trust and bill of sale were not recorded.* This Circuit Court considered that formal articles, a certificate of assumed name, and recording of the various documents were not essential to there being *a completed transaction for income tax purposes*, as of June 30, 1933. In reversing the District Court, this Circuit Court stated at page 991:

“It was shown without dispute that the shareholders were in complete agreement on the matter of discontinuing the corporate operation of the business. * * * In fairness we ought not to close our eyes to the *prior understanding and subsequent conduct* of this small and closely integrated group * * *.

“The corporation divested itself of its tangible assets and did not thereafter operate the business. * * * and there is no pretense that these people acted otherwise than in entire good faith. They were entitled to weigh the advantages of the corporate operation as against its disadvantages taxwise, and to choose the alternative partnership method of holding title to the mill property and of carrying on their business affairs.” (Italics added.)

From an examination of all the facts in the Vallejo Bus transaction it is apparent that the parties *intended* the sale and transfer to be effective on June 1, 1942, that they *completed substantial performance* on said date, and that the lines were *operated* by the partnership on and after said date. It is concluded, therefore, upon authority of the *Seattle Renton Lumber Company* case, *supra*, that the income from the bus lines upon completion of substantial performance of the Vallejo Bus transfer *must be* taxed to the partnership and cannot be taxed to the petitioner.

II.

AS AN ADDITIONAL ARGUMENT PETITIONER CONTENDS THAT THE INCOME FOR THE PERIOD IN QUESTION CANNOT BE TAXED TO THE PETITIONER BUT MUST BE TAXED TO THE PARTNERSHIP BECAUSE SAID INCOME ON AND AFTER JUNE 1, 1942, WAS RECEIVED BY SAID PARTNERSHIP UNDER A CLAIM OF RIGHT AND WITHOUT RESTRICTION AS TO ITS DISPOSITION.

Concerning points 6 and 7 relied upon by petitioner (set forth herein at page 11), petitioner shows as follows:

Petitioner's additional argument is based upon the principle set forth by the Supreme Court in the case of *North American Oil Consolidated v. Burnet*, 286 U. S. 417 (1932). This case involved the taxability of the receipts from oil properties to which the government claimed title but which had been released to the company by the receiver. The litigation over the title to the property was not terminated until the year after that in which the properties were distributed. Nevertheless, the Supreme Court held that the company must return the income for the year in which it was received, notwithstanding the fact that the pendency of the litigation rendered doubtful the ultimate right to retain the properties which produced the income. In so holding, the Court stated at page 424:

"If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is *required to return*, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." (Italics added.)

This principle has recently been restated, enlarged and clarified by the Supreme Court in the case of *Commis-*

sioner of Internal Revenue v. Wilcox, 327 U. S. 404 (1946). In this case the Court held that embezzled funds were not income since they could not have been received under a claim of right, and, moreover, under the laws of the state in which the embezzlement occurred, the wrongdoer never obtained title and was at all times liable for the restoration of the funds. In reaching its decision the Court at page 408 restated the principle of the *North American Oil* case, *supra*, as follows:

“For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the *absence of a definite, unconditional obligation to repay or return* that which would otherwise constitute a gain.” (Italics added.)

Under this latest definition of taxable income there appear to be two essentials: (1) Receipt under a claim of right, and (2) *any* chance that the recipient will be able to retain the receipts.

There is no dispute that the partnership *actually received the income* in question since all receipts and revenues on and after June 1, 1942, were deposited in the partnership's own bank account (R. 17). Moreover, the facts as stipulated are replete in establishing that the revenues were *received under a bona fide claim of right*. Finally, there is nothing whatsoever in the record to indicate that the partnership was under a “*definite unconditional obligation to repay*” the revenues received, or that the partnership received the revenues as agent of the petitioner. It is manifest, therefore, that the latest defi-

dition of the Supreme Court to determine taxability is abundantly satisfied.

Moreover, this principle has been applied by the Circuit Court of Appeals for the Second Circuit in a case involving the receipt of revenue in a transaction having many of the features essential to the matter at issue herein. In the case of *Jacobs v. Hoey*, 136 F. (2d) 954 (1943), cert. den. 320 U. S. 790, five executors of an estate agreed with each other in writing that, *subject to the approval of the Surrogate*, Jacobs would receive 2% for his commission as executor. In 1936 Jacobs was paid \$20,000 on account and in 1937 \$19,500 on account, each of which sums he reported as income in the year paid. The law of New York as established by its courts is to the effect that an executor *cannot take commissions* for the management of an estate until they are allowed by the court. The requisite approval *was not received until 1938*. Jacobs filed claims for refunds of 1936 and 1937 income taxes due to the inclusion of the advances, claiming that they were loans rather than payments for his services. The District Court held against Jacobs and this decision was affirmed by the Circuit Court of Appeals which stated:

“Moreover it has been generally held that such payments received under claim of right, and where the likelihood of not retaining them is slight, are a part of ‘gross income’ * * *.”

It should be noted that in the *Wilcox* case, *supra*, the Supreme Court has enlarged the doctrine so that the

recipient under claim of right is taxable so long as there is *any* likelihood that he will be able to retain the income.

The most recent application of the *Wilcox* doctrine is by the Circuit Court of Appeals for the Fifth Circuit in the case of *Akers v. Scofield*, 167 F. (2d) 718 (1948). In this case Akers obtained money by false pretenses from a wealthy Texas widow during the years 1932, 1933 and 1936. Under the law of Texas, the widow could have sued and recovered this money any time prior to September, 1938. The government assessed and collected a tax against Akers on the theory that he had received the income under a claim of right and this assessment was upheld by the Circuit Court of Appeals. The court distinguished this situation from the embezzlement in the *Wilcox* case, *supra*, since there the recipient received no title to the money, whereas here under the law of Texas the recipient obtained title even though it was through the use of false pretenses.

The *Akers* case, *supra*, establishes that there is a claim of right so long as the recipient got legal title to the property even though he was knowingly obtaining possession by false pretenses. Moreover, since there was a slight chance that he might not have to refund the money received, the second essential of the *Wilcox* doctrine was satisfied. Surely if a swindler such as Akers had a "claim of right" sufficient to make the income taxable to him, how much stronger must be the claim of right of the Vallejo Bus partners who operated a legitimate business to the best of their ability and who had done all they could to comply with the law. Moreover, at all times in

the *Akers* case, *supra*, *Akers* was plainly subject to a lawsuit which would have divested him of the funds received, whereas in the instant case the petitioner had no cause of action against the partnership for a return of the funds in question. Furthermore, the record is utterly devoid of any evidence from which it could be presumed that the partnership received the revenues as agent of the petitioner.

Finally, in the *North American Oil*, the *Akers*, and the *Jacobs* cases, *supra*, the uncertainty as to whether the recipient would have to repay the sums received was not resolved until *after* the close of the taxable year. However, in the Vallejo Bus transaction the approval of the Railroad Commission was received *within the taxable year*. Consequently, prior to the close of said year there was *no chance whatsoever* that the partnership would have to repay the revenues which it had received. It is concluded, therefore, that under the doctrine as restated and enlarged by the Supreme Court in the *Wilcox* case, *supra*, and applied in the *Akers* case, *supra*, the income in question *must be* taxed to the partnership and cannot, therefore, be taxed to the petitioner.

CONCLUSION.

For the foregoing reasons petitioner contends that the revenues from the bus lines on and after June 1, 1942, were taxable income of the partnership under section 22(a) of the Internal Revenue Code and were not taxable income of the petitioner. Petitioner asserts that the fore-

going establishes the points relied upon by petitioner in its petition for review by this Court. Therefore, petitioner respectfully submits that the decision of the Tax Court of the United States should be reversed.

Dated, San Francisco, California,

September 7, 1948.

Respectfully submitted,

LEON DE FREMERY,

CLARENCE E. MUSTO,

Attorneys for Petitioner.

In the United States Court of Appeals
for the Ninth Circuit

HARRY V. SOANES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

FRANK O. BELL, PETITIONER

v.

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LUTHER E. GIBSON, PETITIONER

v.

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VALLEJO BUS COMPANY (A DISSOLVED CALIFORNIA CORPORATION), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

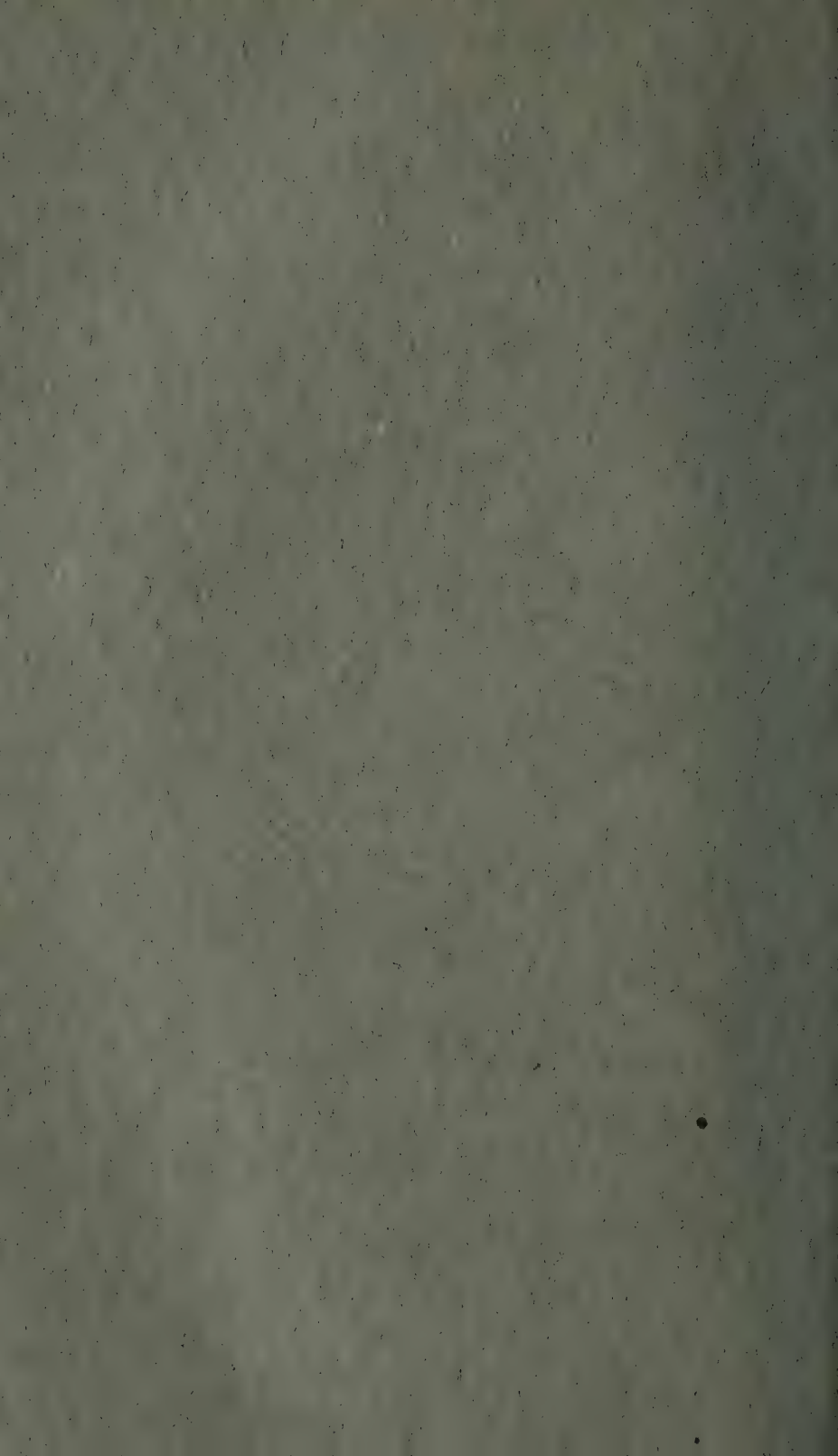
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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Summary of Argument	7
Argument:	
The tax Court properly held the profits derived from the operation of the bus line properties and franchises between June 1, 1942, and September 15, 1942, returnable by taxpayer corporation and not by the partnership	9
A. The record sustains the factual conclusion of the Tax Court that under their agreement the parties intended the bus line properties and franchises to remain the property of taxpayer corporation until their proposed sale to the partnership obtained the approval of the Railroad Commission	10
B. In any event, under the law of California the transfer could not be consummated until approval by the Railroad Commission had been obtained	18
C. The claim of right theory has no application to the instant record	24
Conclusion	26
Appendix	27

CITATIONS

Cases:

<i>Commissioner v. Court Holding Co.</i> , 324 U. S. 331	26
<i>Commissioner v. Sunnen</i> , 333 U. S. 591	16
<i>Commissioner v. Tower</i> , 327 U. S. 280	26
<i>Commissioner v. Wilcox</i> , 327 U. S. 404	24
<i>Corliss v. Bowers</i> , 281 U. S. 376	16
<i>Crum v. Mt. Shasta Power Corp.</i> , 220 Cal. 295	20
<i>Hanlon v. Eshleman</i> , 169 Cal. 200	21
<i>Harrison v. Schaffner</i> , 312 U. S. 579	16
<i>Helvering v. Eubank</i> , 311 U. S. 122	16
<i>Helvering v. Horst</i> , 311 U. S. 112	16
<i>Henderson v. Oroville-Wyandotte Irr. Dist.</i> , 213 Cal. 514	22
<i>Lucas v. Earl</i> , 281 U. S. 111	15
<i>Lucas v. North Texas Co.</i> , 281 U. S. 11	15, 16
<i>Lusthaus v. Commissioner</i> , 327 U. S. 293	26
<i>Michigan Steel Corp. of N. J. v. Commissioner</i> , 38 B.T.A. 435	15
<i>Napa Valley E. Co. v. Calistoga E. Co.</i> , 38 Cal. App. 477	20
<i>North American Oil v. Burnet</i> , 286 U. S. 417	24
<i>O'Brien v. Commissioner</i> , decided January 15, 1945	15
<i>Otter Tail Power Co. v. Clark</i> , 59 N. D. 320	21

Cases—Continued

	Page
<i>Paulsen v. Gilmore</i> , 160 Wash. 232	17
<i>Rouss v. Bowers</i> , 30 F. 2d 628, certiorari denied, 279 U. S. 853	16
<i>Seattle Renton Lumber Co. v. United States</i> , 135 F. 2d 989	16
<i>Slater v. Shell Oil Co.</i> , 39 Cal. App. 2d 535	21
<i>Wass and Stinson Canning Co. v. Commissioner</i> , decided November 30, 1945	15, 16

Statutes:

Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Sec. 36	11
Civil Code of California, Sec. 1739, Rule 2 (Uniform Sales Act)	17
2 Deering's General Laws of California, Act 6386:	
Sec. 2 1/4	18
Sec. 50 1/4	27
Sec. 50 1/3	28
Sec. 51	28
Sec. 76	29
Sec. 77	30
Internal Revenue Code, Sec. 22 (26 U.S.C. 1946 ed., Sec. 22) ..	27

Miscellaneous:

L. O. 1082, I-1 Cum. Bull. 80 (1922)	15
Restatement, Law of Contracts, Sec. 580	20
Rules of Civil Procedure, Rule 52	11
6 Williston on Contracts (Rev. ed.), Sec. 765	20

**In the United States Court of Appeals
for the Ninth Circuit**

No. 11,941

HARRY V. SOANES, PETITIONER

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion (R. 50-58) is the opinion of the Tax Court which is reported in 10 T. C. 131.

JURISDICTION

The petitions for review involve federal declared value excess profits tax and excess profits tax for the year 1942. (R. 61-63.) On March 5, 1946, the Commissioner of Internal Revenue mailed to taxpayers notice of deficiency of declared value excess profits tax liability in the amount of \$3,074.94, and of excess profits tax in the amount of \$27,721.76, both for the year ended December 31, 1942. (R. 3, 7-13, 50.) Within ninety days thereafter, and on May 27, 1946, taxpayers filed petitions with the Tax Court for redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 3-6, 49-50.) The final orders and decisions of the Tax Court, determining that there is a deficiency on the part of taxpayer, Vallejo Bus Company, and liability on the part of the three individual taxpayers, as transferees of the assets of taxpayer, Vallejo Bus Company, for declared value excess profits tax and excess profits tax for the year 1942 in the respective amounts of \$3,074.94 and \$27,721.76, were entered on January 27, 1948. (R. 58-61.) The cases are brought to this Court by petitions for review filed April 26, 1948 (R. 61-64), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948. By order of this Court and stipulation all four petitions for review are consolidated for briefing, argument, hearing and decision, and only the papers filed on behalf of taxpayer, Vallejo Bus Company, and the decisions of the Tax Court in all four cases are printed. (R. 70-71, 74-75.)

QUESTION PRESENTED

Whether the income derived from the operation of certain bus lines for the period June 1, 1942, to September 15, 1942, is taxable to taxpayer, Vallejo Bus Com-

pany, and to the individual taxpayers as transferees of the assets of taxpayer, Vallejo Bus Company.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*.

STATEMENT

Based upon a stipulation and exhibits (R. 50), the Tax Court made the following fact findings:

Taxpayer, Vallejo Bus Company, a California corporation with principal office at Vallejo, California (hereinafter usually designated as taxpayer corporation), was engaged in the operation of bus lines in the vicinity of Vallejo, and reported income from such operations for the period January 1 to May 31, 1942. (R. 50.) As a public utility, taxpayer corporation was subject to the Railroad Commission of the State of California. (R. 51.)

The three individual taxpayers, all residents of Vallejo, were shareholders of the corporation. Taxpayer Soanes owned 50% of its capital stock, taxpayers Gibson and Bell, 25% each. These three individuals decided to operate the business as a partnership and made an oral agreement on May 19, 1942, to acquire and operate the bus lines under the firm name of Vallejo Bus Company. Each individual taxpayer, pursuant to the agreement, was to have an interest in the partnership proportionate to his shareholdings in the corporation. The oral partnership agreement was reduced to writing and signed by the parties on November 12, 1942. (R. 50-51.)

On May 19, 1942, the partnership made an offer to taxpayer corporation to purchase its operative rights and all of its assets except four Reo buses, for the sum of \$29,937.20 cash. The taxpayer corporation accepted the offer on that day and in its corporate minutes re-

cited that the offer of sale and acceptance was (R. 51)—

* * * to become effective on the first day of June, 1942, subject to the approval of said transfer by the Railroad Commission of the State of California.

The contract of sale between taxpayer corporation and the partnership was reduced to writing and signed by the parties on June 9, 1942. (R. 51-52.) It contained the following (R. 52):

It Is Understood and Agreed that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, and the parties hereto shall be and remain in the same relationship and in the same situation that they are in prior to the execution of this agreement, and shall occupy the identical positions and relationships that they would have occupied had this agreement not existed.

Upon receiving the approval of the Railroad Commission of the State of California to said sale, the parties hereto and each of them agree to execute and deliver any and all instruments and documents necessary or convenient to carry into being the full intent and purpose of this agreement, * * *.

On the same day, June 9, 1942, taxpayer corporation as seller and the individual partners as buyers filed a petition with the Railroad Commission of the State of California, requesting the Commission to approve the sale and transfer of its assets and operative rights to the partnership. On September 15, 1942, the Commission issued its order, granting and approving the petition and further requiring that the partnership within sixty days file an appropriate time schedule and

a withdrawal and adoption notice of tariffs, as required by the Commission's regulations, and further to file within thirty days a copy of the partnership agreement. (R. 52-53.)

Taxpayer corporation was dissolved on December 31, 1942. The partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Company, a partnership, and all receipts and revenues from the operation of the business on and after that date were deposited in this bank account. (R. 53.)

Effective on or before June 11, 1942, the beneficiaries in all policies of insurance were changed from taxpayer corporation to "Luther E. Gibson, Harry V. Soanes and Frank O. Bell, doing business as Vallejo Bus Co." The record legal title of automobiles owned by taxpayer corporation was not changed to the partnership until 1943. (R. 53.) The partnership filed a partnership return for 1942 reporting income from the operation of the bus lines for the period June 1 to December 31, 1942. (R. 50.)

The Commissioner ruled that the transfer from taxpayer corporation to the partnership was not effective until the Railroad Commission authorized the transfer in its order dated September 15, 1942, and earnings from the bus line operations to September 15, 1942, should have been included in the income of taxpayer corporation. Hence, the Commissioner determined that the income reported by taxpayer corporation should be increased in the amount of the business earnings between June 1 and September 15, 1942, resulting in the deficiencies in declared value excess profits tax and excess profits tax for the year 1942 here in question. (R. 9-10.) The Commissioner was affirmed upon review by the Tax Court (R. 53-58), and its petition for review here is from the adverse Tax Court decision (R. 61-63).

The Commissioner also determined liability in the individual taxpayers Soanes, Bell and Gibson, for the deficiencies found against taxpayer corporation, as transferees of taxpayer corporation's assets. In the Tax Court, where the proceedings against taxpayer corporation and the three individual taxpayers were consolidated for hearing and decision, the individual taxpayers conceded liability for any deficiency due, but contended that the Commissioner erroneously included in taxpayer corporation's 1942 income the profits of the partnership for the period June 1 to September 15, 1942.¹ (R. 50.)

Similarly, in this Court the individual taxpayers by stipulation (R. 74-75) approved by an order of this Court (R. 70-71) conceded that they are the transferees of taxpayer corporation, that, as such, they are liable for its tax deficiencies for the year 1942 (together with interest), as may here be determined, and that the decisions in the cases of the individual taxpayers are to be governed by the decision of this Court in the case of taxpayer corporation inasmuch as the liability asserted against them is the liability of taxpayer corporation. This order and stipulation further

¹ Thus, before the Tax Court the parties stipulated (R. 19-20) :

If the Court determines that the income from the operation of said bus lines for the period June 1, 1942, to September 15, 1942, was correctly reported by said partnership, then there is no deficiency in Petitioner's income tax or declared value excess profits tax for the calendar year 1942, and the deficiency in Petitioner's excess profits tax for the calendar year 1942 is the sum of \$344.26. If the Court determines that the income from the operation of said bus lines from the period June 1, 1942, to September 15, 1942, is taxable to Petitioner, then the deficiencies to be determined by the Court as follows: Declared value excess profits tax deficiency of \$3,074.94, and excess profits tax deficiency of \$27,721.76. It is stipulated that Luther E. Gibson, Docket No. 11045, Frank O. Bell, Docket No. 11044, and Harry V. Soanes, Docket No. 11043, are transferees of Petitioner herein and as such are liable for such deficiencies as may be determined in this proceeding, together with interest thereon as provided by law.

provide that the four cases be consolidated for briefing, argument, hearing and decision, and that only the papers filed on behalf of taxpayer corporation and the decisions of the Tax Court in the cases of the individual taxpayers be printed as the transcript of record on the four petitions here for review.

SUMMARY OF ARGUMENT

The record sustains the factual conclusion of the Tax Court that under their agreement the parties intended the bus line properties and franchises to remain the property of taxpayer corporation until their proposed sale to the partnership obtained the approval of the California Railroad Commission. Certainly this construction by the trier of the facts of the intention of the parties may not be claimed to be clearly erroneous. Indeed, the record shows that in making this factual finding the Tax Court was only taking the parties at their own sworn word. This appears from the construction which they themselves placed upon the transaction in their application to the Railroad Commission for authorization to transfer the properties and the public operating rights involved. Had the parties understood the agreement to constitute a consummated sale and purchase it would have been simple enough for them to have said so in their application to the Commission. On the contrary, the language, which they actually did use, explicitly establishes that they intended and construed the agreement to be executory and not a completed transaction. The Commission's order of September 15, 1942, granting their application further supports the Tax Court's conclusion that the transfer of the properties had not in fact occurred on any prior date. The intrinsic terms of the contract to sell make plainly apparent the correctness of the constructions by the parties and the Commission. These

establish the intent for an executory transaction and not a completed transfer.

In any event, by force of California law, consummation of the transfer was inhibited prior to receipt of authorization by the Railroad Commission. If the agreement of June 9, 1942, or any other acts by taxpayer corporation had actually contemplated a completed transfer of any part of taxpayer corporation's properties or franchises, clear violation of California statutory provisions would have been entailed and liability for criminal and civil penalties incurred. Hence, upon well settled principles a consummated transaction such as taxpayers here assert would have been unenforceable and void for illegality. The California authorities have repeatedly held that a purported transfer before approval by the Railroad Commission in violation of the controlling statutory provisions confers no rights on the transferee and is completely ineffectual.

Taxpayers' additional argument that the disputed income cannot be taxed to taxpayer corporation but must be taxed to the partners because allegedly received after June 1, 1942, by the partnership under a claim of right, is without foundation in the record. As found by the Tax Court, the record establishes that the possession, if any, by the partnership of the receipts in question during the disputed period was held by the partners as agents for taxpayer corporation which remained their lawful owner until September 15, 1942. A correct construction of the contract as well as the force of California law requires this result. Moreover, the claim of right theory, as here asserted, is inherently fallacious and completely begs the question. If the taxpayer corporation was rightly entitled, as the Commissioner contends, to the earnings during the period between June 1, and September 15, 1942, the circumstance that some other persons might wrongly claim them and that tax-

payer might in addition accede to this incorrect claim does not excuse taxpayer from liability for the tax. Such a novel doctrine would place the Treasury at the mercy of parties arranging between themselves as to which should claim the right to receipts and bear the burden of the tax. Taxpayer corporation is liable for the tax because the income belonged to it as and when earned.

ARGUMENT

The Tax Court properly held the profits derived from the operation of the bus line properties and franchises between June 1, 1942, and September 15, 1942, returnable by taxpayer corporation and not by the partnership

The owner of the income in question, when and as earned, is properly liable for the tax. The source of this income was the bus line properties, namely, the eighteen buses, transportation equipment including coin boxes, machinery, tools, materials, supplies, furniture and business fixtures, and in particular the public franchise and operating rights. (R. 26-27.) It follows that so long as these properties continued in the ownership of taxpayer corporation the income which they earned likewise belonged to and were taxable to it. Hence, as the Tax Court recognized, the principal question in issue is the date when the sale and transfer of these properties from taxpayer corporation to the partnership was consummated. (R. 53.)

We contend that the Tax Court (1) properly construed the intent of the parties to be that the properties were not transferred until after approval by the California Railroad Commission was obtained; and (2) properly held that, in any event, under the law of California, taxpayer corporation was unable to sell, assign, or otherwise dispose of, the whole or any part of these properties necessary and useful in the performance of its public duties or any of its franchises without first having secured an order from the Railroad Commission

authorizing it so to do. Accordingly, until this authority was obtained by the Railroad Commission's order of September 15, 1942, both under the parties' agreement as well as by force of California law, the properties in question, including the operating rights, continued to belong to taxpayer corporation and the profits which they earned continued to be its gain and its tax responsibility.

A. *The record sustains the factual conclusion of the Tax Court that under their agreement the parties intended the bus line properties and franchises to remain the property of taxpayer corporation until their proposed sale to the partnership obtained the approval of the Railroad Commission*

The Tax Court concluded that (R. 54)—

The order of the Commission authorizing the sale was not obtained until September 15, 1942, and transactions prior thereto would appear to be executory and lacking in finality.

Further, "under the facts" (R. 57), the Tax Court held (R. 57-58)—

that the possession, if any, by the partnership, of the bus line, its properties or profits during the period in question, was held by the partnership as agent of petitioner corporation which remained the lawful owner of same until September 15, 1942.

Explicitly referring to the quoted provisions (see Statement, *supra*) of the corporate resolution authorizing the sale "subject to the approval of the Railroad Commission" and of the contract of sale dated June 9, 1942, further prescribing that "in the event said approval is not forthcoming this agreement will be null and void

and of no effect" (R. 56), the Tax Court held that (R. 56-57)—

the sale could not be completed * * * under * * * the contract of the parties until approval by the Railroad Commission was had, and profits earned prior thereto in the bus lines operation belonged to petitioner corporation and is taxable to it.

This construction by the trier of the facts of the intention of the parties is amply sustained by the record. Certainly, it may not be claimed to be clearly erroneous. Section 36 of Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess.; Rule 52 (a), Rules of Civil Procedure. The record shows that in making this factual finding the Tax Court was only taking the parties at their sworn word. This appears from the construction placed upon the agreement by the very parties to it under oath in their application to the Railroad Commission for authorization to transfer the properties and public operating rights involved. (R. 28-32.) Thus, in the petition supporting this application, which was signed by taxpayer corporation and by the partnership (R. 31), and sworn to by its officers and by the partners as true (R. 31-32), it is unconditionally stated (R. 29)—

That applicant Vallejo Bus Company, a corporation, is *at the present time* engaged in the operation of an automotive service for the transportation of passengers * * *. (Italics supplied.)

The petition was dated and verified June 9, 1942 (R. 31-32), the same day as the agreement to sell (R. 26). Moreover, in this petition they explicitly construed the agreement in question as constituting not a present sale, but a contract to sell. They annexed a copy of the agreement to the petition and stated that they had "heretofore entered into" it and that "under * * * [this] agreement" (R. 30)—

The Applicant, Vallejo Bus Company, a corporation, *proposes to sell*, and Applicant Luther E. Gibson, Harry V. Soanes and Frank O. Bell, co-partners * * * *propose to purchase* * * *. (Italics supplied.)

Had the parties understood the agreement to constitute a consummated sale and purchase, it would have been simple enough for them to have said so; the fact is that the language which they actually did use explicitly establishes that they intended and understood the agreement to be executed *in futuro* and, as found by the Tax Court, to intend an executory and not a completed transaction. If possible, this is made even plainer from the further language of the petition that (R. 30)—

The consideration *to be paid* for the property herein *proposed to be transferred*, is the sum of \$29,937.20 of which the sum of \$28,437.20 represents the value of the equipment, and \$1500.00 represents the value of the operative rights. (Italics supplied.)

Finally, the relief requested is not that the Railroad Commission *ratify* a transfer already completed, but for an “order authorizing the transfer”. (R. 31.) Thus, the taxpayers’ own sworn statement conclusively refute their argument on this appeal that they intended a completed transfer on June 1. (Br. 20-24.)

The Commission’s order of September 15, 1942, granting this application, further supports the Tax Court’s conclusion that the transfer of these properties had not in fact occurred on any prior date. This was no *ex parte pro forma* proceeding, but entailed “a public hearing” before an examiner and the submission of testimony. (R. 33.) The application was not granted unconditionally, but subject to conditions which the Commission expressed in its order. Thus, a valuation limitation, important for future rate fixing purposes, was

placed upon the operative rights, and the transferee partnership was required to file time schedule and adoption notice of tariffs upon notice to the Commissioner and the public. (R. 33-34.) Again, the permission was not expressed as a ratification of a past and completed transfer but was an authorization "to transfer, *on or before December 31, 1942* * * * the properties described in the agreement on file in this proceeding, together with the operative rights" (italics supplied) (R. 33), and the order expressly became effective only upon its date (R. 34). Similarly, the partners were required to file a copy of their partnership agreement "within thirty (30) days *after they acquire* the aforesaid properties" (italics supplied) (R. 34), thus clearly contemplating that these properties had not theretofore been the property of the partnership. As a matter of fact, no written partnership agreement actually was then in existence and none was drawn until November 12, 1942 (R. 16), filed with the Commission November 13, 1942 (R. 18), thus, again evidencing the parties' own understanding of the tentative character of the partnership arrangement prior to the Commission's approval of the transfer.

Turning to the agreement itself, consideration of its terms makes plainly apparent the correctness of these several constructions discussed immediately above all to the effect that the transfer was not intended to be consummated until after the approval by the Commission. (R. 26-28.) The contract is not in form a present sale nor bill of sale or transfer. On the contrary (R. 26)—

Seller agrees to sell unto said Buyers and said Buyers agree to buy of and from said Seller * * *.

Indeed, expressly execution and delivery of instruments of transfer were conditioned upon receipt of approval

by the Commission. Thus, the agreement further provided (R. 27)—

Upon receiving the approval of the Railroad Commission of the State of California to said sale, the parties hereto and each of them agree to execute and deliver any and all instruments and documents necessary or convenient to carry into being the full intent and purpose of this agreement, * * *.

This was also the practical construction eventually followed by the parties in carrying out this agreement, for, as stipulated (R. 17)—

6. Record legal title of automobiles as evidenced by ownership certificates were not surrendered to the State authorities for transfer from Vallejo Bus Company to Vallejo Bus Co., and it was not until new ownership certificates were issued in the succeeding year that the record legal title was thus transferred.

The agreement not only left open important provisions for future execution, but actually left open a facet of the transaction for future negotiation, to be entered into only upon receipt of approval by the Railroad Commission. Thus (R. 27-28):

Upon receiving the approval of the Railroad Commission of the State of California to said sale, * * * and at such time the parties hereto shall negotiate a lease in terms agreeable to both parties, wherein and whereby said Seller shall lease unto said Buyers the following described Reo busses of the said Seller: * * *.

The buses described are four in number (as contrasted with the eighteen which taxpayer corporation agreed to sell (R. 26)), and by inference apparently constituted part of its newest transit equipment (R. 38).

Similarly, under the language already referred to,

repeated here for convenience, the agreement sets forth (R. 27):

It is Understood and Agreed that the sale of said personal property herein above described shall be effective as of June 1, 1942, but that same is subject to the approval of the Railroad Commission of the State of California and in the event said approval is not forthcoming, this agreement will be null and void and of no effect, and the parties hereto shall be and remain in the same relationship and in the same situation that they are in prior to the execution of this agreement, and shall occupy the identical positions and relationships that they would have occupied had this agreement not existed.

These terms on their face as well as when read together with the remaining promises and conditions contained in the contract and with the parties' own construction of them discussed, *supra*, surely further express the intention for an executory transaction, lacking in finality. The sale was subject to the approval of the Railroad Commission and in the event this approval was not forthcoming the agreement was of no effect. Only in the event of such approval, as part consideration from the corporation to the partners, the intent of the contract may have been to transfer to the partnership the earnings of the personal property and operating rights retroactively "effective as of June 1, 1942". (R. 27.) These properties and their earnings, as and when earned, continued to belong to taxpayer corporation and were not intended to be transferred until authorized by the Commission. See *Lucas v. North Texas Co.*, 281 U. S. 11; *Michigan Steel Corp. of New Jersey v. Commissioner*, 38 B.T.A. 435, 452; L. O. 1082, I-1 Cum. Bull. 80 (1922); *O'Brien v. Commissioner*, decided January 15, 1945 (1945 P.-H. T. C. Memorandum Decisions, par. 45,069); *Wass and Stinson Canning Co. v.*

Commissioner, decided November 30, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,350). Upon well settled principles, the owner of a business cannot by contract escape the tax upon its earnings and, thus, the income here remained taxable to taxpayer corporation, even if the agreement is considered to amount to an anticipatory assignment payable, after receipt of the State Commission's approval, to the partnership of this income belonging to taxpayer corporation and earned by properties and operating rights belonging to it during the critical period. *Lucas v. Earl*, 281 U.S. 111; *Corliss v. Bowers*, 281 U.S. 376; *Helvering v. Horst*, 311 U.S. 112; *Helvering v. Eubank*, 311 U.S. 122; *Harrison v. Schaffner*, 312 U.S. 579; *Commissioner v. Sumner*, 333 U.S. 591; *Rouss v. Bowers*, 30 F. 2d 628 (C.C.A. 2d), certiorari denied, 279 U.S. 853.

The decision of this Court in *Seattle Renton Lumber Co. v. United States*, 135 F. 2d 989, upon which taxpayers here rely (Br. 23-24), is obviously distinguishable from the instant facts, and, indeed, its reasoning supports the Commissioner's contentions. Thus here, the parties entered into a mere contract to sell; there, on the other hand, a deed was executed and delivered conveying real property and a bill of sale of personal property. Moreover, in the cited case there existed no requirement for approval of the contract by a public body which, until obtained here, left, as the parties well understood, the matter executory and completely lacking in finality. This constituted a substantial impediment to present performance as of the time when the contract was made, and contrary to the factual situation in the cited case, the parties here did not intend a present transfer. See *Wass and Stinson Canning Co.*, *supra*.

The condition, which the contract here imposed, was beyond the control of seller or buyers, and if not ful-

filled rendered nugatory the entire transaction. It is not reasonable to imply an intent, even as between themselves, which for an indefinite period subject to a contingency beyond their control would have placed their affairs in so tentative and unsettled a situation. As we have seen, their own contemporaneous construction without more refutes such an implication. Before the property here involved was in a deliverable condition the consent of the Railroad Commission had to be obtained, and by analogy with the rule applied in sales of personal property a presumption exists against an intention of the parties to a present sale. Civil Code of California, Section 1739, Rule 2 (Uniform Sales Act). See, also, *Paulsen v. Gilmore*, 160 Wash. 232, 295 Pac. 135.

Taxpayer emphasizes statements contained in an opinion by the State Railroad Commission dated March 23, 1943, and by the Commission's engineer in a report to the effect that the bus lines operated as a partnership after June 1, 1942. (R. 37, 47-48; Br. 17-19.) The Tax Court was clearly entitled to regard these as merely conclusory, not binding on it and without probative value. (R. 56.) The only question involved before the Commission in the cited proceeding was the determination of rates; the partnership was then unquestionably the operating owner, and the issue here involved was not at all relevant, was not litigated before it nor presented to it for decision. The construction, afforded by the parties themselves before the instant controversy arose and in the course of their application for authority to make the transfer from the corporation to the partnership, is certainly to be preferred.

A question of intention, such as is here involved, is peculiarly one of fact for resolution by the trier of the facts in the light of all the evidence presented in a particular case. Even if arguably the record does

contain some evidence favorable to taxpayers' contention, the record is nevertheless replete with evidence sustaining the Tax Court's finding that the parties to this agreement did not intend a transfer before receipt of approval by the Railroad Commission, and no adequate ground is shown for disturbing this finding on appeal.

B. *In any event, under the law of California the transfer could not be consummated until approval by the Railroad Commission had been obtained*

In the preceding subpoint A, the Commissioner has contended that the parties did not intend the transfer to be completed until receipt of authorization by the Railroad Commission. In this subpoint B, the further contention is made that in any event by force of California law consummation of the transfer was inhibited prior to receipt of authorization by the Railroad Commission.

The controlling California statute is Act 6386, 2 Deering's General Laws of California, known as "Public Utilities Act". Concededly, taxpayer corporation was (R. 16)—

an active operating public utility under the jurisdiction of the Railroad Commission of the State of California, and held a certificate of necessity issued by said Commission dated May 6, 1941.

Specifically, taxpayer corporation was a "passenger stage corporation" as defined by Section 2 1/4 of that Act. Section 50 1/4 of the Public Utilities Act provides (Appendix, *infra*):

Any right, privilege, franchise or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the Railroad Commission. * * *

Moreover, by Section 50 1/3, violation of the quoted provision is constituted a misdemeanor, punishable by fine not exceeding \$500 and imprisonment for a term not to exceed six months or both. (Appendix, *infra*.) Again, Section 51 (a) of the same statute, legislating with respect to public utilities in general, provides as follows (Appendix, *infra*) :

No public utility shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, * * * without first having secured from the railroad commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. * * *

Sections 76 and 77 of this statute (Appendix, *infra*) impose penalties to the amount of \$500 upon any public utility violating any provision of the statute and punishment for a misdemeanor by fine not exceeding \$1,000 or by imprisonment not exceeding one year or by both upon any officer, agent or employee of any public utility, who violates or fails to comply with any provision of the statute.

Accordingly, it seems plain that if the agreement of June 9, 1942, or any other acts by the parties to that agreement or by taxpayer corporation alone had actually constituted a completed transfer of any part of taxpayer corporation's properties or its franchises and operating rights described in the agreement (R. 26-27), all of which were necessary or useful in performance of its public duties and franchises, before it had first secured the authority of the Railroad Commission, the

cited criminal and penal provisions of the Public Utility Act would have been infringed. A consummated transaction, such as taxpayers here assert, falls within the direct prohibition of the statute and upon well settled principles would have been unenforceible and void for illegality. *Napa Valley E. Co. v. Calistoga E. Co.*, 38 Cal. App. 477. See, also, 6 Williston on Contracts (Rev. ed.), Sec. 765; Restatement, Law of Contracts, Sec. 580.

Taxpayers' contention, as stated in their brief, is as follows (p. 13):

* * * that the sale of June 1, 1942, was valid on that date *as between the parties thereto* since the Railroad Commission had no authority concerning this sale other than its statutory authority to veto the sale if it should be found contrary to the interests of the public.

The plain language of the statute, however, establishes that this contention is without merit. The statute, as has been seen, does not read that the Railroad Commission may ratify or veto a previously consummated sale. On the contrary, Section 50 1/4 expressly prescribes that a franchise held by a passenger stage corporation may be sold "only upon authorization" by the Commission. Again, even more explicitly, Section 51 (a) insists that "No public utility shall henceforth sell, * * * without *first* having secured" (italics supplied) an order from the Commission, authorizing it so to do. Moreover, "Every such sale * * * made other than" in accordance with an order of the Commission authorizing it "shall be *void*." (Italics supplied.) The California courts have repeatedly ruled that the statute means what it plainly states and that prior to authorization by the Commission, a purported transfer by a public utility is void, and confers no rights upon the purported transferee. In *Crum v. Mt. Shasta Power Corp.*, 220

Cal. 295, 309-311, the Supreme Court of California, passing upon the validity of an offer by a public utility to convey its property, where rights *inter sese* of the parties to the attempted transfer were in question, held that the transfer was “*beyond the power*” (italics supplied) of the utility “to make without first securing the consent of the railroad commission.” (Pp. 309-310.) In *Slater v. Shell Oil Co.*, 39 Cal. App. 2d 535, 546-547, the court held, applying Section 51 of the Public Utilities Act, that an attempted transfer without the prior authorization of the Railroad Commission was “totally ineffectual”. (P. 546.) In the cited case, it is noteworthy that as in the instant case one of the parties to the attempted transfer was a closed corporation. The court said (p. 547):

It is to be noted that this provision declares every transfer without consent of the Railroad Commission is void. That the section means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee, and that third persons may raise this defense, is clearly established by the following cases: *Webster Mfg. Co. v. Byrnes*, 207 Cal. 630 [280 Pac. 101]; *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295 [30 Pac. (2d) 30]; *Napa Valley E. Co. v. Calistoga E. Co.*, 38 Cal. App. 477 [176 Pac. 699].

The cases of *Hanlon v. Eshleman*, 169 Cal. 200, and *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915, relied upon in their brief by taxpayers (pp. 13-17), are clearly distinguishable from the instant case for the reasons stated by the Tax Court in its opinion (R. 54-55). In fact, the opinion in the *Hanlon* case discloses that the court was there considering only an application to the Commission by owners ready to sell and not those who had already sold. Thus, in the *Hanlon* case, *supra*, p. 203, the court said:

The provision that an owner may not sell without the consent of the commission implies that there must be an owner ready to sell and seeking authority so to do before the commission is called upon to act.

While the legislature may have vested the power to authorize sales of public utilities in the Commission primarily for the benefit of the public, nevertheless, the better to preserve that function for the Commission, it plainly prescribed that a sale without first the Commission's authorization is of no validity whatsoever. The *Hanlon* case held only that it is not the function of the Railroad Commission, but of the courts, to determine the rights of the parties under a contract of sale, where in dispute. On the other hand, the cited case did not in any sense hold that a purported transfer under such a contract possesses any validity lacking the Commission's approval. Indeed, such is the interpretation of the *Hanlon* case taken in a later case, decided by the same court, *Henderson v. Oroville-Wyandotte Irr. Dist.*, 213 Cal. 514, 529-531, where it was again held (pp. 529-530):

No sale of property burdened with a public use is legal, or of any validity whatever, unless the authority to make such sale is first given by the Railroad Commission.

Similarly, the North Dakota case of *Otter Tail Power Co.*, *supra*, does not sustain the taxpayers' contention, but turned on issues of fraud, estoppel, and other questions entirely irrelevant to the instant question. The action was in equity and the ultimate question was whether the trial court had properly exercised its discretion in granting injunctive relief. The North Dakota statute there was similar to the California statute here involved. Indeed, the court held, in ac-

cordance with the Commissioner's contention here, that (p. 330)—

while Clark was inhibited from making a sale of the property to the plaintiff and the bill of sale was void, the executory or option agreements were not illegal or invalid and such agreements were not affected by the invalidity of the bill of sale.

The court decided after a consideration of the particular circumstances that the trial court was justified in granting equitable relief, since "While it may be said that both parties are in delicto, it cannot be said that they stand in *pari delicto*." (P. 333.) Thus, the case turned upon equitable considerations peculiar to its facts and actually represents a holding that a purported bill of sale in violation of the statute was void. This is directly contrary to taxpayers' contention here.

Again, contrary to taxpayers' contention (Br. 17-19), statements contained in the engineer's report and the Railroad Commission's opinion in the subsequent rate fixing proceeding, decided in March, 1943 (R. 35-48), to the effect that the business operated as a partnership after June 1, 1942, afford no material support to taxpayers' interpretation of the California statutes. As already pointed out, the only question before the Commission in the cited proceeding was the fixation of reasonable rates or fares to be charged during future operations after March, 1943, at a time when the partnership was concededly the owner. No question as to the date when the partnership became the owner or of the interpretation of the California statutes and decisions here involved was in issue, litigated, presented for decision, or decided. The statements upon which taxpayers rely were contained in mere recitals of background and may be regarded as inadvertencies completely immaterial to the issue there presented to the Commission for decision.

Finally, in accordance with well settled principles, it is proper here to presume that the parties did not harbor nor express an intent which would entail the commission of crimes and liability for statutory penalties. On the contrary, the assumption is that their intention, expressed in their contract, was for an executory not a completed transaction, a legal intention and not an illegal one.

C. The claim of right theory has no application to the instant record

As an additional argument, taxpayers contend in their brief that the income in question cannot be taxed to taxpayer corporation but must be taxed to the partners on the ground that allegedly after June 1, 1942, the income was received by the partnership under a claim of right. (Br. 25-29.) In the first place, as already discussed, the Commissioner controverts the contention that the partnership received the disputed income after June 1, 1942, under a claim of right adverse to taxpayer corporation or that the partners were free from restrictions as to disposition of this income for the period between June 1, 1942, and September 15, 1942. Hence, for these reasons alone, taxpayers' instant contention cannot be supported under the principles of the cases which establish the claim of right doctrine. *North American Oil v. Burnet*, 286 U. S. 417; *Commissioner v. Wilcox*, 327 U. S. 404. Thus, as discussed in detail under subpoint A, *supra*, the contract to sell was expressly subject to approval of the Railroad Commission and in the event approval was not forthcoming, the agreement was to be null and void and of no effect and the parties to remain in the same relationship and position as prior to its execution. (R. 27.) As also argued under subpoint A, the parties did not intend a present transfer and the

partnership's claim eventually to receive the income for the period in dispute was not, as a matter of fact, based upon claim of ownership in the interim period. Moreover, by force of California law, an attempted transfer before authorization by the Commission had been obtained would have been entirely ineffectual and a claim of right based upon such an attempted transfer might have subjected the claimants to criminal and civil penalties. Thus, it is not lightly to be assumed that the partners made such claim. (See subpoint B, *supra*.) The profits of the interim period must be regarded as additional consideration to become the property of the purchasers when transfer from the corporation was actually consummated and effective. Under these circumstances, certainly it was not clearly erroneous for the Tax Court to find that possession, if any, by the partnership of the profits during the interim period was held by the partnership as agent of the taxpayer corporation, which remained their lawful owner until September 15, 1942. (R. 57-58.)

In any event, advanced as a ground for excusing taxpayer corporation from paying the disputed tax, this contention adds nothing to the previous argument and, indeed, begs the question. If taxpayer corporation was the owner of the earnings of the business between June 1 to September 15, 1942, as the Commissioner contends, it must return them and it is assessable for the income taxes due upon them. The circumstance that some other persons, e.g., the partners, allegedly might incorrectly have claimed this income as their own affords taxpayer corporation no excuse from tax liability; nor could agreement by this taxpayer to such incorrect claim destroy its obligation to the Treasury. An application of the claim of right doctrine, not to a taxpayer who claims the right but with respect to a taxpayer who claims to be without

right surely is novel, as the Tax Court observed (R. 57), and is without precedent, as far as our research discloses. If this doctrine prevailed, the Treasury would be at the mercy of parties who might readily arrange between themselves as to which should claim the right and bear the burden of the tax. For example, in cases of anticipatory assignments of income, usually the assignee claims the right to the income and concedes tax liability. Nevertheless, the assignor has repeatedly been held liable taxwise. *Lucas v. Earl, supra*; *Helvering v. Horst, supra*; *Harrison v. Shaffner, supra*; *Commissioner v. Tower*, 327 U. S. 280; *Lusthaus v. Commissioner*, 327 U. S. 293. See, also, *Commissioner v. Court Holding Co.*, 324 U. S. 331.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
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Special Assistants to the
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OCTOBER, 1948.

Internal Revenue Code:

SEC. 22 [As amended by Sec 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

2 Deering's General Laws of California:

Act 6386. *Public Utilities Act*. * * *

* * * * *

§ 50 1/4. *Operation of passenger stages: Certificate: Complaints: Fee*.

* * * * *

No passenger stage corporation shall hereafter operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require such operation, * * *. Any right, privilege, franchise or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the Railroad Commission. * * *

* * * * *

§ 50 1/3. *Penalties for violations by stage corporations.* Every passenger stage corporation, as defined in this act, who violates any provision of section 50 1/4 of this act, or who aids or abets, or without being present shall have advised or encouraged any person or corporation in the violation of said section, is guilty of a misdemeanor and shall, upon conviction thereof, if a person, be punished by a fine not exceeding five hundred dollars or by imprisonment in a county jail for a term not to exceed six months, or by both such fine and imprisonment; or, if a corporation, shall be punished by a fine not to exceed five hundred dollars. [Added by Stats. 1933, p. 966.]

§ 51. *Selling, leasing, etc., of public utilities: Acquisition of stock of another utility.* (a) No public utility shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, * * * with out first having secured from the railroad commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

(b) *Acquisition of stock of another utility.* No public utility shall hereafter purchase or acquire, take or hold, any part of the capital stock of any

other public utility, organized or existing under or by virtue of the laws of this state, without having been first authorized to do so by the commission. Every assignment, transfer, contract or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this section shall be void and of no effect, and no such transfer shall be made on the books of any public utility. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. [Amended by Stats. 1927, p. 78.]

§ 76. *Penalty for offenses not otherwise provided.* (a) Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

(b) *Every violation a separate offense.* Every violation of the provisions of this act or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

(c) *Act of employee deemed act of utility.* In construing and enforcing the provisions of this act relating to penalties, the act, omission or failure of any officer, agent or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be and be deemed

to be the act, omission or failure of such public utility.

§ 77. *Punishment of utility employees.* Every officer, agent or employee of any public utility, who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the constitution of this state or of this act, or who fails to obey, observe or comply with any order, decision, rule, direction, demand or requirement or any part or provision thereof, of the commission, or who procures, aids or abets any public utility in its failure to obey, observe and comply with any such order, decision, rule, direction, demand or requirement, or any part or provision thereof in a case in which a penalty has not hereinbefore been provided for such officer, agent or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

APPENDIX B

SECTION 6 OF APPELLANT'S LEASE PROVIDES AS FOLLOWS

SECTION 6. It is further mutually understood and agreed as follows:

(6a) That the lessor may, in writing, waive any breach of the covenants and conditions contained herein, except such as are required by the act, but any such waiver shall extend only to the particular breach so waived, and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

(6b) The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease upon payment of all rents, royalties, and other debts due and payable to the workmen employed by the lessee, and upon a satisfactory show-

No. 11,941

IN THE

United States Court of Appeals
For the Ninth Circuit

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Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FRANK O. BELL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

LUTHER E. GIBSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

VALLEJO BUS COMPANY (a dissolved California corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FILE

PETITIONERS' REPLY BRIEF.

NOV - 1948

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CLERK

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Subject Index

	Page
I.	
In his first argument respondent attempts to show that the parties intended the bus lines and franchises to remain the property of taxpayer corporation until approval was obtained from the Railroad Commission	2
II.	
In his second argument respondent contends that under the law of California the transfer could not be consummated until approval by the Railroad Commission had been obtained	13
III.	
In answer to petitioner's additional argument, respondent in his brief advances two arguments with which he attempts to show that the "claim of right" doctrine has no application to this proceeding	23
Conclusion	30

Table of Authorities Cited

Cases	Pages
Akers v. Scofield, 167 F.2d 718; cert. den. October 11, 1948	26
Crum v. Mt. Shasta Power Corp., 220 Cal. 295, 30 P.2d 30 (1934)	17
Hanlon v. Eshleman, 169 Cal. 200, 146 Pac. 656 (1915) ...	19, 20, 21
Henderson v. Oroville-Wyandotte Irr. Dist., 213 Cal. 514, 277 Pac. 487 (1931)	20
Jacobs v. Hoey, 136 F.2d 954 (1943)	26
Napa Valley El. Co. v. Calistoga El. Co., 38 Cal. App. 477, 176 Pac. 699 (1918)	15, 17
North American Oil Consolidated v. Burnet, 286 U. S. 417 (1932)	25, 28, 29
Otter Tail Power Co. v. Clark, 59 N. D. 320, 229 N. W. 915 (1930)	22
Ross v. Commissioner, 169 F.2d 483 (1948)	29, 30
St. Regis Paper Company v. Higgins, 157 F.2d 884 (1946); cert. den. 330 U. S. 843	24, 25
Seattle Renton Lumber Company v. United States, 135 F.2d 989 (1943)	9
Slater v. Shell Oil Co., 39 Cal. App. (2d) 535, 103 P.2d 1043 (1940)	17, 18, 19, 20
Vallejo Bus Co., In re, 44 C.R.C. 627 (1943)	7, 12, 23
Woodbine v. Van Horn, 29 Cal. (2d) 95, 173 P.2d 17 (1946)	10

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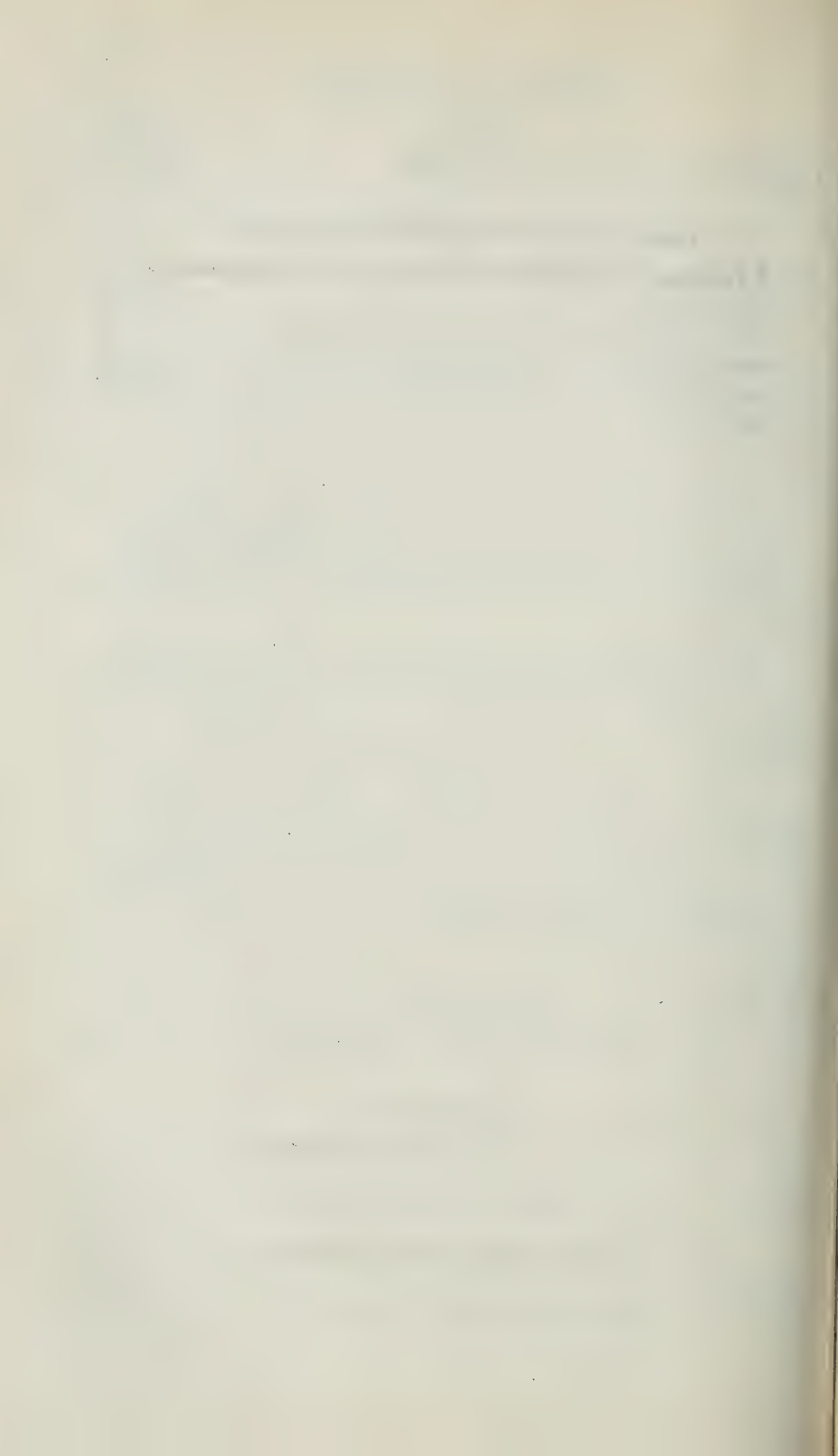
23 American Jurisprudence, Section 36	21
Restatement, Law of Contracts, Section 580	15, 16
Williston on Contracts (Rev. Ed.), Volume 6, Section 1765	15, 16, 22
Williston on Sales (Rev. Ed.), Volume 2, Section 273	11

Statutes	Pages
Civil Code of California, Section 1739.....	9, 10, 11

General Laws of the State of California

Public Utilities Act of California:

Section 50 $\frac{1}{4}$	13
Section 50 $\frac{1}{3}$	13
Section 51(a)	18, 19, 20
Section 76	13
Section 77	13



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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF.

I.

IN HIS FIRST ARGUMENT RESPONDENT ATTEMPTS TO SHOW THAT THE PARTIES INTENDED THE BUS LINES AND FRANCHISES TO REMAIN THE PROPERTY OF TAXPAYER CORPORATION UNTIL APPROVAL WAS OBTAINED FROM THE RAILROAD COMMISSION.

This contention, of course, completely overlooks the clear statement in the document executed on June 9, 1942, that the sale and transfer is effective on June 1, 1942 *except* in the event that approval of the Railroad Commission is *not* forthcoming.

In this connection respondent first examines the petition filed with the Railroad Commission and certain of the recitals contained therein. However, the purpose of the petition was to bring to the notice of the Railroad Commission the transaction contained in the agreement of sale and to request an order authorizing this transfer. Consequently, regardless of what was said in the *recitals* in the petition, the *substance of the transaction was contained in the agreement of sale attached to the petition*. The transaction for which the Commission's authorization was requested was for a sale of the operative assets and franchises of the petitioner, and as noted in the written agreement, "the sale of said personal property herein above described *shall be effective as of June 1, 1942.*" (R. 27, italics added.) This is the sale the Commission was asked to authorize and this is the sale the Commission did authorize.

Respondent then notes that the relief requested in the petition to the Railroad Commission was not to "*ratify* a transfer already completed, but for an 'order authorizing the transfer'." (Br. 12.) Respondent concludes from

this that the transfer referred to in the petition could not therefore be completed prior to the Railroad Commission's order. True the petition to the Railroad Commission asked for an "order authorizing the transfer", but the transfer referred to is the one contained in the exhibit to the petition, which transfer was plainly stated to be "effective as of June 1, 1942". Again, this is the sale the Commission was asked to authorize and this is the sale the Commission did authorize.

Respondent next notes that the Railroad Commission's order authorizing the sale contained certain conditions, but an examination of the Railroad Commission's order indicates that it is not merely a single order authorizing the sale *subject* to certain conditions but is a group of four orders (R. 33, 34). In its first order the Commission authorized the transfers of the properties in question; second, the Commission ordered the partnership to file a time schedule; third the Commission ordered the partnership to file a copy of their articles of partnership; and fourth, the Commission set the effective date of its order. It is respectfully called to the Court's attention that the order authorizing the transfer is not made dependent upon compliance with the other three orders.

Respondent in passing notes that the partnership's articles were not reduced to writing until November 12, 1942 (Br. 13) and from this infers that the partnership arrangement prior to this date was merely of a tentative character. This, however, is an irrelevant consideration since the Civil Code of California does not require written articles of partnership and since the respondent and petitioner have stipulated (R. 16) that the articles of

partnership drawn up on November 12, 1942 merely reduced to writing the *prior understanding* of the partners. Consequently, no change in the partnership itself was effected by reducing the articles to writing and no inference may therefore be drawn that the partnership was any less durable prior to the reduction of the articles to writing than it was after. Because of the foregoing, petitioner respectfully requests that respondent's inference in this regard be disregarded.

Respondent next examines the agreement of sale itself which was drawn up on June 9, 1942 (Br. 13-16). By examining some, but not all, of the provisions of this document respondent concludes that it speaks only in the future. His explanation of the flat statement that the sale will be "effective as of June 1, 1942" is that this was a mere attempt to pass title retroactively (Br. 15). It should be noted, however, that the offer and acceptance resulting in a valid and binding contract of sale was executed on May 19, 1942; this is set out at length in Exhibit 2 (R. 23-25). In this underlying transaction it is stated: "said sale to become effective on the 1st day of June, 1942, subject to the approval of said transfer by the Railroad Commission of the State of California" (R. 24). This offer and acceptance created a valid contract of sale on May 19, 1942 and there is nothing retroactive in the passage of title on June 1, 1942 since that date is obviously *subsequent* to the date on which the contract of sale was made. The provisions of the document drawn up on June 9, 1942 are in all material respects the same as the offer and acceptance completed on May 19, 1942. Cf. Exhibit 2 and Exhibit 3 (R. 23-28). This document restates that

June 1, 1942 is the effective date of the sale and *clarifies the intention of the parties* concerning the approval of the Railroad Commission by stating that the sale will be effective on June 1, 1942 *except* "in the event said approval is *not* forthcoming, * * *" (R. 27, italics added). It is apparent from this condition that the parties clearly intended the sale to be effective on June 1, 1942, and remain effective unless defeated by the express condition subsequent, to-wit, that the approval does *not* forthcome. Furthermore, the parties carried out this intent by their actions. A few examples of such actions are: The opening of the bank account by the partnership in its own name on June 1, 1942 (R. 17); the depositing of all revenues and receipts from the bus lines in the partnership's bank account (R. 17); and the endorsing of all of petitioner's insurance policies over to the partners and the partnership (R. 17). Moreover, since the parties owning the petitioner were identical with the partners composing the partnership, the transfer was merely a change in the bus line's form of business organization and hence there was no reason whatsoever to anticipate that the approval of the Commission would not be forthcoming in due course. Since the document was dated June 9, 1942 and since the effective date was June 1, 1942, and since the parties had taken the various steps indicated above, it seems certain that as of the date of the document the parties understood that the sale was already effective and was to remain effective except upon the remote contingency that the Railroad Commission would refuse to approve the transfer from the corporate to the partnership form of business. The remoteness of the possibility

of the Railroad Commission's refusing to approve the transfer is even more apparent when it is considered that the financial ability to respond to damages would necessarily be greater under the partnership form to the obvious benefit of the public.

Returning to the document of June 9, 1942, it should be noted that by this date the consideration in the sum of \$29,937.20 had been paid to the seller and in this document the receipt of this sum is acknowledged. Furthermore, in this document the property sold is described in detail and with particularity, including "all franchises and operating rights of the said Seller" (R. 26, 27). The description of the property is followed by the following sentence:

"To Have and to Hold the same [i. e. the described property] unto said Buyers for the sum of Twenty Nine Thousand Nine Hundred Thirty Seven and 20/100 (\$29,937.20) Dollars, in lawful money of the United States of America, receipt of which is hereby acknowledged by the said Seller." (Italics added.)

It is petitioner's contention that despite the executory phraseology of the first part of this document (R. 26), the habendum clause quoted above, plus the fact that *the entire consideration had been paid*, makes it clear that this document must be interpreted as a *bill of sale* transferring title to the described property from the seller to the buyers on June 1, 1942. It follows that not only did the parties intend to transfer the bus line properties and franchises immediately without waiting for approval of the Railroad Commission but that they actually accomplished the transfer of title by this bill of sale.

It is clear, therefore, for the reasons set out in petitioner's opening brief (pp. 20-24) and for the additional reasons set out herein that respondent's piecemeal examination of the various documents produces a clearly erroneous conclusion as to the intention of the parties as to the effective date of the sale and transfer in question.

Moreover, the interpretation which the Railroad Commission placed upon the agreement of sale, the petition, its order authorizing the sale, and the transaction *in its entirety* is made plain from its opinion in the rate case, *In re Vallejo Bus Co.*, 44 C.R.C. 627 (1943). In this proceeding it was necessary for the Railroad Commission to determine the actual date of transfer of the properties from the corporation to the partnership since the amount of income taxes allowed as a deduction from operating revenues could not otherwise be ascertained and since the fares which the Commission would permit the bus lines to charge were directly dependent upon its net operating revenues, past, present, and prospective. The Railroad Commission, therefore, had to consider the intention of the parties in their agreement of sale, the intention of the parties in their petition to the Railroad Commission concerning the transfer and sale, and the effect of the Commission's order issued in response to that petition. In the rate case public hearings were held (R. 35), a report was prepared by the Commission's Transportation Research Engineer (an expert) (R. 35), the partnership was represented by attorneys, the city of Vallejo was represented by an attorney, Petaluma subdivision was represented by an attorney, the Vallejo Chamber of Commerce was represented by an attorney, and certain other tax-

payers were represented by an attorney (R. 35). The finding of fact reached by the Commission after public hearings, an expert's report and the arguments of numerous attorneys was that "The company operated as a corporation until June 1, 1942, *after which time it becomes a partnership*" (R. 37, italics added). For the reasons set forth above, this is not an immaterial finding of fact since this was one of the factors upon which the ultimate rate reached was directly dependent. This finding of fact of the Railroad Commission in an adversary proceeding clearly indicates what the Commission thought was the intention of the parties as to the effective date of the sale and what the Commission thought were the material portions of the petition, the contract of sale, and its own order concerning the effective date of sale. This opinion of the Railroad Commission in the rate case is, therefore, most material and helpful in resolving any superficial ambiguities which may appear from a piecemeal consideration of the documents in question.

Respondent in passing (Br. 14) notes that it has been stipulated (R. 17) that record legal title of the automobiles as evidenced by ownership certificates were not surrendered to the state authorities for transfer from the corporation to the partnership and that it was not until new ownership certificates were issued in the succeeding year that record legal title was thus transferred. Respondent cites this as material in showing that the parties did not intend to transfer the property in question. It should be noted, however, that the stipulated facts concern only "*record legal title*" and not actual title to the vehicles in question. This fact would appear, therefore, to be im-

material since, as noted by this Court in *Seattle Renton Lumber Company v. United States*, 135 F.2d 989 (1943), the deed, declaration of trust and bill of sale were *not recorded*. Therefore, in the *Seattle Renton* case, “*record legal title*” to the assets remained in the vendor. Nevertheless, as petitioner has pointed out in its opening brief (p. 23), this Court considered that recording the various documents was *not essential* to there being a completed transaction for income tax purposes at the date contended for by the taxpayer therein. Petitioner respectfully submits, therefore, that the mere formality of recording legal title is immaterial in determining the intention of the parties as to the effective date of the Vallejo Bus sale and hence should be disregarded.

Respondent in his brief (pp. 16, 17) suggests that it is not reasonable to imply an intent for a transfer as of June 1, 1942 since the parties’ affairs would remain in an *unsettled state* until the Railroad Commission acted and this would be for an indefinite period. This appears to be an unwarranted inference since as it turned out the whole matter was settled in approximately three months and furthermore, as heretofore pointed out, it is unreasonable to presume that the Commission would have refused its approval.

Respondent continues in his brief (p. 17) by stating “a presumption exists against an intention of the parties to a present sale” since the goods were not in a *deliverable condition*. In this regard respondent cites Rule 2 of Section 1739 of the Civil Code of California. These rules help to ascertain when the property in the goods passes to the buyer. If the goods were not in a deliverable condition,

the respondent is correct. However, whether or not goods are in a deliverable condition must be determined by the intention of the parties as to what constitutes a deliverable condition. The recent case of *Woodbine v. Van Horn*, 29 Cal. (2d) 95, 173 P. 2d 17 (1946), concerned the sale of certain eucalyptus wood "to be cut in sixteen and twenty four inch lengths and all wood over five inches in diameter to be split". The Court nevertheless held that there had been a completed sale prior to cutting, and at page 107 noted:

"* * * * Under the terms of the agreement, Van Horn, the seller, had to cut the wood into certain lengths and split some of the wood before the goods would be in a deliverable state. *But this presumption is not conclusive* if there is substantial evidence justifying a determination that the contract is one of sale.

"The conduct of the parties frequently shows whether they regard the bargain as passing the property and the fact that part of the purchase price is paid by the buyer is evidence that the parties contemplate an immediate transference of the property in the goods.
* * *'' (Italics added.)

Petitioner submits, therefore, that Rule 2 of Section 1739 of the Civil Code of California is not applicable to the facts in the Vallejo Bus transaction since the *entire* purchase price had been paid by June 9, 1942 (R. 27) and the parties had previously executed the sale on June 1, 1942 (although it might later be invalidated if the Commission's authorization was *not* forthcoming). Petitioner submits, therefore, that Rule 3 of Section 1739 of the

Civil Code of California governs the sale in question. Rule 3 reads as follows:

“(Delivery ‘on sale or return.’) (1) When goods are delivered to the buyer ‘on sale or return,’ or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.”

Further evidence as to the applicability of Rule 3 is noted in the stipulation of facts (R. 17) wherein insurance policies covering the property in question were endorsed over to the buyers on June 11, 1942. It is apparent that on and after this date the *buyers* considered the *risk of loss for damage to the property or from the use of the property was theirs*. In the treatise 2 Williston on Sales, Revised Edition, Section 273, it is stated:

“Varying consequences of sale or return and sale on approval.

“The differences in the rights of the parties in the two kinds of agreement under consideration are briefly the differences which always exist between the rights of those having the property and of those having merely a contract for the property. *If the property has passed, the risk of accidental loss or damage rests upon the buyer. If the property has not passed, the risk still remains with the seller. * * **”
(Italics added.)

Petitioner submits, therefore, that the transaction in question is covered by Rule 3 of Section 1739, Civil Code of

California, and the intention to make a present sale must, therefore, be presumed.

Respondent's final argument regarding the intention of the parties as to the effective date of the sale and transfer in question concerns the opinion of the Railroad Commission in the rate case, *In re Vallejo Bus Co.*, supra. Respondent notes in his brief (p. 17) "The only question involved before the Commission in the cited proceeding was the determination of rates; the partnership was then unquestionably the operating owner, and the issue here involved was not at all relevant, was not litigated before it nor presented to it for decision." Petitioner believes that its discussion of *In re Vallejo Bus Co.*, herein, (pp. 7-8) and in its opening brief (pp. 17-19) demonstrates that the issue involved in the present case was clearly relevant and highly material to the determination of the rates in the rate case. At the risk of being repetitious, petitioner, however, wishes to emphasize the importance of this decision to the issue herein. In determining the fair rate to be charged it was necessary for the Railroad Commission to consider the past earnings of the bus lines, the present earnings of the bus lines and prospective earnings of the bus lines. *The past earnings of the bus lines could not be determined without deducting as an expense from gross revenues the amount of income taxes paid to the Federal Government.* If income taxes had been paid in the sum asserted by respondent herein, the bus lines' earnings for the year 1942 would have been materially reduced and would, of course, have materially reduced the rate of return realized by these lines (Cf. Table I, R. 39). Consequently, if the Commission had con-

sidered the corporation to be the owner until September 15, 1942, they may well have fixed a higher rate for fares to be charged during and after the year 1943. Therefore, the actual owner of the properties was *directly in issue* in the rate case and any findings in this regard by the Commission may *not* "be regarded as inadvertencies completely immaterial to the issue there presented to the Commission for decision" as respondent has characterized them in his brief (p. 23).

Petitioner respectfully asserts, therefore, in answer to respondent's argument concerning the intention of the parties as to the effective date of the transaction in question, that for the reasons set forth herein and in petitioner's opening brief said transaction was clearly *intended by the parties* to be effective as of June 1, 1942. Petitioner concludes, therefore, that the Tax Court's interpretation of the stipulated facts is clearly erroneous and therefore the decision of the Tax Court should be reversed.

II.

**IN HIS SECOND ARGUMENT RESPONDENT CONTENTS THAT
UNDER THE LAW OF CALIFORNIA THE TRANSFER COULD
NOT BE CONSUMMATED UNTIL APPROVAL BY THE RAIL-
ROAD COMMISSION HAD BEEN OBTAINED.**

In this connection respondent first notes that Section 50 $\frac{1}{3}$ of the Public Utilities Act of California makes a violation of Section 50 $\frac{1}{4}$ a misdemeanor and provides for punishment upon conviction thereof. Respondent also notes that Sections 76 and 77 of the Public Utilities Act provide penalties for violations of the Act for offenses

not otherwise provided within the Act. Respondent reasons from this that if the Vallejo Bus transaction had been a completed transfer prior to securing the authority of the Railroad Commission, it would have infringed the criminal and penal provisions of the Public Utilities Act and would have been void for illegality. Petitioner asserts that respondent's conclusion in this regard is wholly unfounded and immaterial to the case at issue and for the reasons set forth below, merely tends to cause confusion.

In the first place, if, as respondent contends (Br. 20), the sale was void until approval was received from the Railroad Commission, the action would be a complete nullity and consequently would constitute no violation of the penal provisions of the Public Utilities Act since they do not punish an *attempted* violation but only an actual violation of the Act. It would follow, therefore, that there could never be a violation of the Public Utilities Act concerning the sales and transfers of a utility's assets until subsequent to a decision of the Commission since, if respondent is sound, any sale prior thereto would be nugatory and void.

In the second place, the inclusion of penal provisions in the Public Utilities Act would seem to indicate that the legislature realized that a sale could be consummated *prior to approval* by the Railroad Commission, that such a sale was not null and void in its inception and might result in a violation of the Public Utilities Act if such sale were not later approved. This is in accordance with petitioner's contention that where a sale has actually been consummated, as in the Vallejo Bus transaction, the action of the Commission concerning such

sale is in reality either a ratification or a veto of that sale.

In concluding his argument concerning the penal provisions of the Public Utilities Act, respondent in his brief (p. 20) states as follows:

“* * * A consummated transaction, such as taxpayers here assert, falls within the direct prohibition of the statute and upon well settled principles would have been unenforceable and void for illegality. * * *”

Respondent then cites *Napa Valley El. Co. v. Calistoga El. Co.*, 38 Cal. App. 477, 176 Pac. 699 (1918), and refers also to 6 Williston on Contracts (Rev. Ed.), Section 765 [1765], and Restatement, Law of Contracts, Section 580. Respondent's conclusion that a *consummated* transaction is unenforceable and void for illegality does not appear to be supported by either the case or the treatises cited. In the *Napa Valley* case Napa and Calistoga were both public utilities and gave mutual options to each other for the sales of their properties. Napa exercised its option and Calistoga refused to convey. Napa then brought this suit to compel conveyance and the lower Court sustained a demurrer to Napa's complaint because Napa had failed to allege that it had secured an order of the Railroad Commission of California authorizing the sale. Napa refused to amend its complaint and the plaintiff appealed to the District Court of Appeal on this *sole* ground. The District Court of Appeal affirmed the lower Court in upholding defendant's demurrer. Consequently the only question before the District Court of Appeal was one of pleading. Thereafter plaintiff sought to petition to have the cause heard by the Supreme Court of Cali-

fornia, which was denied. However, it is interesting to note that in denying this petition the Supreme Court stated:

“In denying the application, we deem it proper to say that we do so upon the theory that, in view of the matters stated in the opinion, the equitable remedy of specific performance is not available to the plaintiff. In view of such a conclusion, *it is unnecessary to decide whether the attempted agreement was absolutely void*, and we are not to be understood as expressing any opinion thereon.” (Italics added.)

This opinion of the Supreme Court of California shows first that the Supreme Court considered that the case decided *only a question of pleading* and, secondly, that whether or not the contract was absolutely void was an open question in California. Although respondent has cited this case as authority that a *consummated* transaction would have been unenforceable and void for illegality, the case did not concern a consummated transaction but only concerned a point of *pleading* upon a contract of sale *which had not yet been executed*.

Section 1765 of Williston on Contracts (interpreting Section 580 of the Restatement) which the respondent also cites as stating that a *consummated* transaction is unenforceable and void, reads as follows:

“Statutes prohibiting certain sales or requiring licenses therefor.

“Where a statute *prohibits altogether* the sale of certain goods, not only is the bargain for such sale invalid, but if the sale *is made* in violation of law,

the agreed price cannot be recovered. * * *'' (Italics added.)

It should be noted that Williston considers that the sale *can be made* even though the statute *prohibits it altogether* and the only thing which cannot be enforced is the recovery of the purchase price by the seller. It is apparent, therefore, that the *Napa Valley* case and the treatise are a far cry from the proposition for which they are cited and, as a matter of fact, uphold petitioner's contention that the Vallejo Bus transaction resulted in a sale and transfer effective as of June 1, 1942.

Respondent's second argument (Br. 20) concerning the Public Utilities Act of California attempts to show that the California Courts have repeatedly ruled that prior to authorization by the Commission a purported transfer by a public utility is void and confers no rights upon the purported transferee. In support of this proposition respondent first cites the cases of *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 30 P.2d 30 (1934), and *Slater v. Shell Oil Co.*, 39 Cal. App. (2d) 535, 103 P.2d 1043 (1940). Respondent states (p. 21) that in the *Mt. Shasta* case the Supreme Court of California was "passing upon the validity of an offer by a public utility to convey its property, where rights *inter sese* of the parties to the attempted transfer were in question, * * *". An examination of the *Mt. Shasta* case shows that plaintiff was suing defendant on the ground that defendant had interfered with plaintiff's use of certain waters. Plaintiff was required to show actual or prospective damages under the law of California. In the trial

Court the defendant, a public utility, offered a stipulation showing it had agreed to maintain the level of certain waters in Pitville Pool by maintaining a dam there and by causing the discharge into said pool water from the Fall River. All of the water of the Fall River had been dedicated to a public use. The trial Court refused to admit this stipulation into evidence and the only question before the Supreme Court was *whether this evidence was properly excluded*. The Supreme Court affirmed the trial Court on this point on the theory that defendant could not make such a *promise* without first securing the authority of the Railroad Commission. It is apparent, therefore, that there was not a completed transfer of assets as in the Vallejo Bus transaction but only a question of whether or not the admission of a *promise* pertaining to a *future* transfer of assets by a public utility was *properly excluded from evidence* when offered by a defendant to show a lack of actual damage to the plaintiff. The case is plainly *not* authority for any proposition concerning the rights of parties, *inter sese*, to a purported transfer, and hence should be disregarded.

Respondent next cites a dictum from the *Slater* case, *supra*, which dictum, standing alone, tends to uphold his interpretation of Section 51(a) of the Public Utilities Act. Petitioner respectfully asserts that an examination of the facts of the *Slater* case, *supra*, will clearly show that it is not in point. Respondent has not set out the *Slater* facts in his brief, so for convenience a summary of these follows herein:

Shell's wholly owned subsidiary pipe line company, a public utility, owned a right of way across Slater's land.

This subsidiary conveyed all its assets to Shell and later was dissolved. Subsequent to the dissolution, Shell constructed a second pipe line over the right of way and Slater sued for damages on the theory that Shell was not the owner of the right of way. The trial Court granted a nonsuit on the sole ground that Shell received the right of way upon the dissolution of its wholly owned subsidiary. The only question before the District Court of Appeal was whether or not the trial Court should have granted the nonsuit. In reversing the trial Court, the District Court of Appeal was only free to rule upon the narrow question of whether or not Shell received the right of way upon the dissolution of its wholly owned subsidiary public utility. This case is clearly not applicable to the Vallejo Bus transaction since the Court was not called upon to decide the rights *as between the parties to the transfer* but was only called upon to protect the interests of the public, one of whom was Slater.

By citing the *Slater* case, *supra*, respondent reveals his fundamental misconception of Section 51(a) and of the Railroad Commission's powers thereunder. As clearly stated by the Supreme Court of California in *Hanlon v. Eshleman*, 169 Cal. 200, 202; 146 Pac. 656 (1915), and noted in petitioner's opening brief at page 14, "*The Commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone.*" (Italics added.) In the Vallejo Bus transaction, however, we are not concerned with "the rights of the public interested in the service" but are interested in the rights of the parties to the transfer.

Respondent (Br. 22) next attempts to refute the doctrine of *Hanlon v. Eshleman*, supra, with a dictum from the case of *Henderson v. Oroville-Wyandotte Irr. Dist.*, 213 Cal. 514, 277 Pac. 487 (1931). Respondent, however, as in the *Slater* case, supra, does not set forth the facts in the *Henderson* case, so for convenience they will be summarized herein. In the *Henderson* case two irrigation companies in 1922 each conveyed a part of their assets to defendant. This sale was approved by the Railroad Commission but certain conditions were imposed as to the areas which had to be served and as to the rates to be charged. The present action was a suit by land owners and water users outside of the exterior boundaries of the defendant for a determination of their rights and duties and those of the defendant in the service of water to the plaintiffs and the rates to be charged therefor. It is obvious, therefore, that the parties litigant are not the vendor and vendee but are the *interested public* as plaintiffs and the vendee as defendant. One of the defendant's defenses was that in specifying conditions as to rates and persons to be served in its order authorizing the sale in 1922 the Commission went beyond its jurisdiction under Section 51(a) of the Public Utilities Act. The dictum cited by respondent herein is in that part of the case which holds that the Railroad Commission was not exceeding its jurisdiction. The dictum cited by respondent (Br. 22) reads as follows:

“ * * * No sale of property burdened with a public use is legal, or of any validity whatever, unless the authority to make such sale is first given by the Railroad Commission. * * * ”

Respondent, however, does not cite the sentence immediately following this dictum, which reads as follows:

“* * * In approving or authorizing such a sale, the Railroad Commission has jurisdiction to impose such conditions as will in the judgment of the Railroad Commission protect and safeguard the pre-existing rights of those entitled to service under said public utility. * * *”

It is obvious from this that the dictum cited by respondent as refuting the *Hanlon v. Eshleman*, supra, doctrine is in effect an affirmance and restatement thereof since the authority to impose conditions is stated to be to “protect and safeguard the pre-existing rights of those entitled to service under said public utility”, to-wit, to protect the rights of the public.

Respondent in his brief (p. 22) makes the following statement, the latter part of which appears to be unfounded and contrary to available authority.

“* * * While the legislature may have vested the power to authorize sales of public utilities in the Commission primarily for the benefit of the public, nevertheless, the better to preserve that function for the Commission, *it plainly prescribed that a sale without first the Commission's authorization is of no validity whatsoever.* * * *” (Italics added.)

The latter proposition stated by respondent (italicized above) is plainly contrary to the statement set forth in 23 Am. Jur., *Franchises*, Section 36, and quoted by petitioner in its opening brief (p. 14), which, for convenience, is repeated herein:

“* * * Generally, an unauthorized transfer of a public utility franchise is not ipso facto void; *on the contrary, the transfer will be treated ordinarily, as valid and effectual* until attacked by the sovereign grantor in a direct proceeding instituted for the purpose. * * *” (Italics added.)

Moreover, respondent's proposition is also contrary to Section 1765 of Williston on Contracts, cited by respondent in his brief (p. 20) and set forth hereinabove.

Respondent in his brief (p. 22) next considers the case of *Otter Tail Power Co. v. Clark*, 59 N. D. 320, 229 N. W. 915 (1930), relied upon by petitioner in its opening brief (p. 15, et seq.). Regardless of what respondent claims in his brief, the *Otter Tail* case, *supra*, *actually* held that a completed sale was valid as between the parties thereto, and regardless of any statements of the Supreme Court of North Dakota or of *why* it held this sale to be valid, the important point is that the sale *actually was held to be valid*. As petitioner has noted in its opening brief (p. 15), there appear to be no California cases in which the vendor and vendee have been the parties litigant for a determination of the validity of a completed sale as between themselves. This, however, is the exact point decided by the Supreme Court of North Dakota under a statute which is in all essentials identical with that of the Public Utilities Act of California. Cf. petitioner's opening brief (p. 16) setting forth these statutes. The issue in the *Otter Tail* case, *supra*, is, therefore, directly in point and the fact that the Court enforced the sale *prior to approval by the Railroad Commission* cannot be side-stepped regardless of the grounds upon which this sale was held valid and enforced.

Respondent's next contention (Br. 23) concerning the validity of the Vallejo Bus transaction under the law of California concerns the finding of fact contained in the rate case, *In re Vallejo Bus Co.*, supra. For the reasons set forth by petitioner hereinabove, petitioner reiterates that the finding of fact by the Railroad Commission, to-wit, that "The company operated as a corporation until June 1, 1942, *after which time it becomes a partnership*" (R. 37, italics added) was material to the issues before the Commission in that case and to the issue before the Court herein.

Petitioner respectfully asserts, therefore, in answer to respondent's argument that under the law of California the transfer could not be consummated until the approval of the Railroad Commission had been obtained, that for the reasons set forth in petitioner's opening brief and hereinabove respondent's conclusion in this regard is clearly erroneous. Petitioner respectfully contends that the decision of the Tax Court of the United States concerning the effect of the transfer under the law of California is likewise clearly erroneous and should therefore be reversed.

III.

IN ANSWER TO PETITIONER'S ADDITIONAL ARGUMENT, RESPONDENT IN HIS BRIEF ADVANCES TWO ARGUMENTS WITH WHICH HE ATTEMPTS TO SHOW THAT THE "CLAIM OF RIGHT" DOCTRINE HAS NO APPLICATION TO THIS PROCEEDING.

Respondent's first argument in answer to petitioner's additional argument, attempts to show that the receipt of income for the period in question by the partnership was

not under a claim of right but was as *agent* of the tax payer corporation.

Respondent begins his agency argument by interjecting into the claim of right doctrine the requirement that the claim of the recipient must be *adverse* to that of another possible claimant (Br. 24). However, it has recently been held that an adverse interest is not necessary in order to bring the claim of right doctrine into operation. In the case of *St. Regis Paper Company v. Higgins*, 157 F.2d 884 (CCA 2, 1946), cert. den. 330 U.S. 843, St. Regis received cash dividends from its wholly owned subsidiary during the years 1936 and 1937. Said dividends were in violation of a trust indenture (the terms of which were known to St. Regis) and upon notice given in 1938 by the trustee of said indenture, said subsidiary rescinded the declaration of said dividends and St. Regis returned them to said subsidiary. Since the subsidiary was wholly owned and controlled by St. Regis, the latter obviously had no adverse interest. Nevertheless St. Regis was held taxable on the dividends for the years 1936 and 1937. In reaching its decision the Court carefully considered the lack of adverse interest and even went so far as to concede that St. Regis could have been held a constructive trustee of the funds. The Court stated:

“But even though it now be conceded that the appellant could have been charged as a constructive trustee, the claim of right under which it did receive the dividends and hold them as its own until sometime in 1938 is enough to make them income to the trustee for tax purposes in the year of their receipt.”

On authority of the *St. Regis* case, petitioner contends that respondent's interjection of an adverse interest into the claim of right doctrine is unfounded.

Respondent, continuing with his first argument, makes the assumption, wholly unsupported by the stipulated facts and exhibits, that the income in question was not received free from restrictions as to its disposition. (Br. 24.) However, an examination of the record reveals that all receipts and revenues on and after June 1, 1942 were deposited in the partnership's own bank account (R. 17) and there is nothing in the record whatsoever to indicate any restrictions upon the funds contained therein. The logical inference which must be drawn from the shifting of the revenues from the taxpayer's bank account to that of the partnership is that the income was received by the partnership on its own account and without restriction as to its disposition. Respondent apparently relies on the fact that under the agreement of sale it was provided that in the remote event approval of the Railroad Commission was not forthcoming, the parties were to return to the same relationship and position as prior to its execution. The mere fact that the income might have to be returned by the partners to the corporation does not alter the fact that the income must be reported as the income of the partners under the doctrine of *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932), as pointed out in petitioner's opening brief (p. 25). In this case the Supreme Court specifically stated that the doctrine applied even though the income might later have to be refunded.

Continuing with respondent's first argument, respondent next asserts that possible future criminal liability by the recipients of the income in question must negative any rightful claim (Br. 25). However, as shown by petitioner in its opening brief (pp. 28, 29), this is an irrelevant consideration, and it was so decided in the recent case of *Akers v. Scofield*, 167 F.2d 718 (1948), cert. den. October 11, 1948. In this case Akers, who obtained money by false pretenses and was *previously convicted* of this crime, was nevertheless held to have received the money under a claim of right sufficient to require the funds being taxed to him. See also *Jacobs v. Hoey*, 136 F.2d 954 (1943), cited in petitioner's opening brief at page 27.

Further evidence to indicate that the Tax Court was clearly in error in holding that the partnership was acting as an agent of the taxpayer herein is to be found in the stipulated fact (R. 17):

"Said partnership opened a bank account on June 1, 1942, in the name of Vallejo Bus Co., a partnership, and all receipts and revenues from the operation of said business on and after that date were deposited in said bank account."

Such an account opened by a partnership whose stated purpose was the operation of bus lines for its own account wholly negatives any idea that the receipt of the funds was as an agent. Moreover, Article 5 of the stipulation reads as follows:

"On or about June 11, 1942, endorsements were requested with respect to all policies of insurance issued to petitioner naming as assured on said policies Luther E. Gibson, Harry V. Soanes and Frank

O. Bell, doing business as Vallejo Bus Co. Said endorsements were made by the insurers and were effective on or before June 11, 1942." (R. 17).

These endorsements clearly indicate that the partnership was conscious that it was operating the assets on its own behalf and *at its own risk* and consequently the partnership itself wanted the protection of insurance to indemnify it in case of accident. Furthermore, the change of the insured from the taxpayer to the partnership indicates that the partnership was conscious it was not operating the assets for the benefit of the petitioner corporation nor is it reasonable to suppose that the petitioner corporation believed that it was having assets operated on its behalf for which it might be held completely liable without the protection of insurance.

For all of the foregoing reasons taxpayer respectfully asserts that it was clearly erroneous for the Tax Court to conclude that possession by the partnership of the proceeds during the period in question was by the partnership as agent of the taxpayer corporation which remained their lawful owner until September 15, 1942.

Respondent's second argument, in answer to petitioner's additional argument, is based upon an erroneous notion that the claim of right doctrine is merely a handy tool to prevent tax evasion and hence can be used only by the government. Respondent first states that the claim of right doctrine when used as a defense "begs the question" (Br. 25) under the assumption that the taxation of the earnings must follow the ownership of the property. Respondent thus argues that if the corporation was the owner of the earnings from June 1 to September 15, 1942,

it must pay taxes upon them irrespective of the fact that the partners would have income which they would be "required to return" for income taxation under the doctrine of the *North American Oil* case, *supra*. This argument is obviously fallacious since if it were sound, the earnings for this period would be taxable to both the corporation and to the partners. This argument of the respondent fails to recognize the fact that the claim of right doctrine is an *exception* to the general rule that taxable income follows ownership of the property producing such income. This the petitioner has made clear in its opening brief (p. 25) in its discussion of the *North American Oil* case, *supra*. As established by that case, the claim of right doctrine is a rule to determine to whom income must be taxed *regardless of the actual ownership of the property producing the income*. To emphasize this point, the words of the Supreme Court in the *North American Oil* case, *supra*, are repeated herein:

"If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is *required to return*, even though it may still be claimed that he is not entitled to retain the money, and *even though he may still be adjudged liable to restore its equivalent*." (Italics added).

The words "required to return" leave no doubt that the Supreme Court intended this doctrine of taxable income to be mandatory; hence, if taxpayer A is *required to return* certain earnings, taxpayer B is not. On whom the incidence of tax is to fall is of as much concern to taxpayers as it is to the government. Therefore, petitioner cannot be denied the use of a fundamental concept to show that

the income from the bus lines *must be taxed* to the partnership and not to the petitioner. An analogous situation was presented in the recent case of *Ross v. Commissioner*, 169 F.2d 483, July 13, 1948, in which the Commissioner sought to ignore the doctrine of constructive receipt when invoked by a taxpayer as a defense. Justice Frankfurter, who sat with the First Circuit and wrote the opinion, dismissed this argument of the Commissioner as follows:

“However, in this circuit at least, it seems settled that the doctrine of constructive receipt can be asserted by a taxpayer to defeat an attempt to assert a tax in a later year. * * * *If this is so, the doctrine does not merely afford a special choice which the Commissioner may, if he sees fit, exercise retroactively against a taxpayer, but a rule of law, determining what constitutes taxable income, and as such presumably binding on all parties. * * **” (Italics added).

As noted above in the *North American Oil* case, *supra*, the claim of right doctrine determines what income a recipient is “required to return” and consequently the doctrine is as fundamental a doctrine of income tax law as is the doctrine of constructive receipt. In reliance on the rationale of the *Ross* case, *supra*, taxpayer asserts that it may not be precluded from the use of the doctrine as a defense.

Respondent closes his second argument, in answer to petitioner’s additional argument, by asserting that if the claim of right doctrine can be used as a defense “the Treasury would be at the mercy of parties who might readily arrange between themselves as to which should claim the right and bear the burden of tax.” (Br. 26). Respondent then cites a group of cases involving the

assignment of income, family partnerships, and a purported sale by shareholders of corporate assets. The results reached in these cases are ample proof that the Treasury is not at the mercy of the taxpayer. The claim of right doctrine used as a defense is no more open to abuse than the constructive receipt doctrine likewise used as a defense. Cf. *Ross v. Commissioner*, supra.

CONCLUSION.

Petitioner respectfully asserts that respondent has failed to refute petitioner's conclusions set forth at pages 29-30 of petitioner's opening brief. Hence, as established by petitioner's opening and reply briefs, the revenues from the bus lines on and after June 1, 1942, were taxable income of the partnership under section 22(a) of the Internal Revenue Code and were not taxable income of the petitioner, and the decision of the Tax Court of the United States was clearly erroneous in holding otherwise. Therefore, petitioner respectfully submits that the decision of the Tax Court of the United States should be reversed.

Dated, San Francisco, California,
November 4, 1948.

Respectfully submitted,

LEON DE FREMERY,

CLARENCE E. MUSTO,

Attorneys for Petitioners.

Nos. 11,943 - 11,944

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES M. AGNEW, JR., GEORGE AKI, HOWARD ALLRED, JOAQUIN BARRASA, HENRY BEHRENS, THEO. BRYANT, ALEX. CHESTER, CLEMENT CHUN, RICHARD CHUNG, HUMBERTO CLARO, WM. DARDING, CLARENCE DAVIS, ROBERT DAVIS, EDWARD DONER, ALFRED EGGEN, FRED ELIAS, ABE GOLDSTEIN, LEO GRUSZUECZKA, JACKSON HARRIS, COLLINS HEDGEPATH, EDMUND HOLLAND, HUGO HORNLEIN, THEO. HOWARD, STEPHEN JOSEPH, FRED JOST, FRANK KAMKI, THOMAS KELLEHER, CHARLES KEYES, JOHN KIM, RICHARD KIM, CHARLES MAROIS, GEORGE MASSEY, CARLOS MATTOS, JOHN MENDES, MATT MESKEILL, GILBERT MONREAL, ALFRED MORDEN, SAMUEL MORRIS, A. MORTENSON, ERWIN O'NEALE, CHESTER PIEKOS, ALFRED RYE, JOHN SCHUCK, WM. SMITH, HENRY STOLZ, IVAR VIKE, ROBERT WAKELAND, CHESTER ZACKIEWICZ,

Appellants,

VS.

AMERICAN PRESIDENT LINES, LTD. (a corporation), and UNITED STATES OF AMERICA,

Appellees.

No. 11,943

(CONSOLIDATED
CASES)

JOHN W. GRIFFIN, WILLIAM E. HAMILTON, JOSEPH D. HEBBLE, FRANK KNOWLES, THOMAS D. LAMSON, K. LAWLER, JOHN NAPOLEON, SYDNEY O. OLSEN, JOHN J. SEXTON, JOSEPH C. SMITH, MATTHEW C. SULIVAN, JON THUESEN, and JOHN VANDERVEER,

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VS.

AMERICAN PRESIDENT LINES, LTD. (a corporation), and UNITED STATES OF AMERICA,

Appellees.

No. 11,944

FILED

AUG 3 - 1948

BRIEF FOR APPELLANTS.

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Subject Index

	Page
Statement of Jurisdiction.....	2
Statement of the Case.....	3
Specification of Assigned Errors Relied Upon.....	10
Argument of the Case.....	11
1. The shipping articles were plain, certain and unambiguous, and clearly entitled the libelants to war bonus, at the rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage	11
2. The court erred in admitting oral and written evidence to contradict the terms of the riders attached to the shipping articles	15
3. The District Court erred in denying libelants recovery of war bonus from the date they were captured by the Japanese to the date they crossed the 180th meridian on the repatriation voyage	18
4. The District Court erred in denying libelants any recovery of maintenance	19
5. The District Court erred in finding and decreeing that all libelants were entitled to was a war bonus on the repatriation voyage	24
6. The District Court erred in failing to award costs to libelants	25
Conclusion	26

Table of Authorities Cited

Cases	Pages
Agnew v. American President Lines, D. C. Cal. 1947, 73 F. Supp. 944	16
Carson v. American S. & R. Co., D. C. Wash. 1928, 25 F. 2d 116	15
Cortes v. Baltimore Insular Line, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368.....	22, 25
Glandzis v. Callinicos, 2 Cir. 1944, 140 F. 2d 111.....	12
Lakos v. Saliaris, 4 Cir. 1940, 116 F. 2d 440.....	12
Minnesota S. S. Co. v. Lehigh Valley Tsp. Co., 6 Cir. 1904, 129 F. 22	16
The Andrea F. Luckenbach, 9 Cir. 1935, 78 F. 2d 827.....	15
The Bouker No. 2, 2 Cir. 1917, 241 F. 831.....	21
The Capillo (Steeves v. American Mail Lines), 9 Cir. 1946, 154 F. 2d 24.....	10, 13, 15, 16, 17
The Catalonia, D. C. Va. 1916, 236 F. 554.....	13, 22
The Denny, 3 Cir. 1942, 127 F. 2d 404.....	15
The Florence Olson, 9 Cir. 1922, 283 F. 11.....	13, 22
The John L. Dimick, D. C. Me. 1858, 13 Fed. Cas. 690, Case No. 7355	20, 23
The Thomas Tracy, 2 Cir. 1928, 24 F. 2d 372.....	13, 22
The Western Cross (McDonald v. United States), 2 Cir. 1923, 292 F. 593	13, 22

Statutes

Judicial Code, Section 128.....	2
28 U.S.C.A., Section 41 (3)	2
28 U.S.C.A., Section 225.....	2
28 U.S.C.A., Section 230.....	2
28 U.S.C.A., Section 837.....	25
45 U.S.C.A., Section 564 (5)	11, 12

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Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD. (a corporation), and UNITED STATES OF AMERICA,

Appellees.

No. 11,944

BRIEF FOR APPELLANTS.

The appeal is by the libelants in actions by seamen to recover wages and maintenance. The actions were consolidated for trial with two similar actions. (No. 11,943, A 286.) They have appealed from the final decree entered therein (No. 11,943, A 605-609) because the District Court did not award them enough. The appeals are presented on typewritten apostles with a reporter's transcript in common (No. 11,943, A 298-558) and with the original exhibits and depositions before the court (No. 11,943, A 622).

STATEMENT OF JURISDICTION.

The libels in these causes were by seamen to recover wages and maintenance. (No. 11,943, A 2-6; No. 11,944, A 1-6.) The District Court had jurisdiction. (28 U.S.C.A., sec. 41 (3).) Final decree was entered by the District Court in the consolidated actions on November 18, 1947. (No. 11,943, A 605-609.) An order allowing an appeal in each cause was entered February 4, 1948. (No. 11,943, A 614; No. 11,944, A 52-53.) The appeals were timely. (28 U.S.C.A., sec. 230.) Jurisdiction of this court to review the final decree of the District Court is therefore sustained by section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The basic facts are undisputed. Each appellant was a member of the crew of the vessel President Harrison when it sailed from San Francisco to the orient on October 17, 1941. (No. 11,943, A 587.) The appellee American President Lines was the owner and operator of the vessel (No. 11,943, A 587) and it was a twin screw vessel with a power tonnage of 17,509 tons (No. 11,943, A 342/7 to 343/13). Each had signed the shipping articles on October 15, 1941. (No. 11943, A 564/1-3.) Each appellant in No. 11,943 was a member of the unlicensed personnel. (No. 11,943, A 589-590.) He was also a member of the Sailors' Union of the Pacific or of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association. (No. 11,943, A 589-590.) Each appellant in No. 11,944 was a member of the licensed personnel. (No. 11,943, A 590.) He was also a member of the Marine Engineers Beneficial Association or of the National Organization of Masters, Mates, Pilots of America. (No. 11,943, A 590.)

The following rider on the shipping articles was applicable to unlicensed personnel and the appellants in No. 11,943:

“RIDER FOR PASSENGER & FREIGHT VESSELS IN THE
TRANSPACIFIC & STRAITS SETTLEMENT SERVICE

1. The American President Lines agrees to pay an emergency wage increase to the unlicensed crew of the SS President Harrison, Voyage 55, as follows:

2. The monthly basic wages as shown in the following agreements between the Pacific Ameri-

can Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Sailors' Union of the Pacific—Effective October 10, 1939.

Pacific Coast Marine Firemen, Oilers, Water-tenders and Wipers' Association—Effective October 1, 1941.

Marine Cooks and Stewards' Assn. of the Pacific Coast—Effective July 5, 1940.

3. To all employees entitled to received basic wages of \$120.00 per month or less under said agreement, the sum of \$80.00 per month.

4. To all employees entitled to receive in excess of \$120.00 per month under said agreement, 66 $\frac{2}{3}$ % of such basic monthly wage.

5. The emergency wage increase to apply from the crossing of the 180th meridian west-bound until crossing the 180th meridian east-bound.

6. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employee shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.

7. In the event the loss of personal effects by any member of the unlicensed crew, due to neces-

sity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

8. War risk insurance in the sum of \$5,000 shall be furnished to members of the crews on this voyage.

AMERICAN PRESIDENT LINES, LTD.

(Seal)

U. S. SHIPPING COMMISSIONER

Port of San Francisco, Calif.

/s/ R. A. Frediani."

The following rider on the shipping articles was applicable to licensed personnel and the appellants in No. 11,944:

"RIDER FOR PASSENGER & FREIGHT VESSELS IN THE
TRANSPACIFIC & STRAITS SETTLEMENT SERVICE

1. The American President Lines agrees to pay an emergency wage increase of 60% of their basic wages to the licensed crew of the SS President Harrison, Voyage 55.

2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Masters, Mates and Pilots—Effective December 30, 1939.

Marine Engineers Beneficial Assn.—Effective May 1, 1940.

American Communications Association—Effective July 13, 1940 and as amended by arbitration award of May 3, 1941.

3. This emergency wage increase to apply from the crossing of the 180th meridian west-bound until crossing the 180th meridian east-bound.

4. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein.

5. In the event of loss of personal effects by any member of the licensed crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse such licensed men so affected by an amount not in excess of \$500.00.

6. War risk insurance in the sum of \$5,000 shall be furnished to licensed members of the crew on this voyage in accordance with agreements.

AMERICAN PRESIDENT LINES, LTD.

(Seal)

U. S. SHIPPING COMMISSIONER

Port of San Francisco, Calif.

/s/ R. A. Frediani

Deputy U. S. Shipping Commissioner."

The President Harrison crossed the 180th meridian westbound on October 28, 1941. (No. 11,943, A 3, 10; No. 11,944, A 3, 9.) It was intercepted by the Japanese on December 8, 1941, grounded on Shaweishan Island, China, and vessel and crew were captured by the Japanese. (No. 11,943, A 312/3 to 317/3, 588.) The crew were captured on the island and were ordered back to the vessel by the Japanese the next day. (No. 11,943, A 317/2-10.) They remained aboard the vessel from December 9, 1941, until they were put ashore at Shanghai, China—some on March 5, 1942, others on March 12, 1942. (No. 11,943, A 317/11 to 318/23.)

The internment of the unlicensed personnel by the Japanese west of the 180th meridian lasted from December 8, 1941, until August 15, 1945. (No. 11,943, A 3, 10-11, 588.) The internment of the licensed personnel by the Japanese west of the 180th meridian lasted from December 8, 1941, until September 15, 1945. (No. 11,944, A 3, 9.) Thereafter, the appellants were repatriated by the United States Government to a continental United States port. (No. 11,943, A 588.) On the repatriation voyage the appellants in No. 11,943 (unlicensed personnel) were west of the 180th meridian for a period of 17 days. (No. 11,943, A 602.) On the repatriation voyage the appellants in No. 11,944 (licensed personnel) were west of the 180th meridian for periods varying from 9 to 28 days. (No. 11,943, A 603.)

Appellants were discharged at a continental port of the United States. (No. 11,943, A 4, 11-12; No.

11,944, A 3.) At the time of their discharge they were paid basic wages (except maintenance) and emergency wages to the date of discharge. (No. 11,943, A 4, 11-12; No. 11,944, A 3, 10.) They were also paid war bonuses from the date the vessel crossed the 180th meridian westbound (October 28, 1941) to the date the vessel was captured by the Japanese (December 8, 1941). (No. 11,943, A 4, 11-12; No. 11,944, A 3, 10.) They were not paid war bonus for the period commencing with their capture by the Japanese west of the 180th meridian and ending with their crossing of the 180th meridian eastbound on repatriation. Nor were they paid any maintenance. A stipulation at the trial was as follows (No. 11,943, A 378/2-7):

“The Court. But in like manner is also admitted there is nothing that results from the manner or the amount of payments of the money that was paid to the men that has deprived them of the right to assert this claim in court. There is nothing, no legal waiver involved, is that correct?

Mr. Adams. Yes.”

By their respective libels the appellants sought to recover war bonus at the rates stipulated in the shipping articles for the period they were west of the 180th meridian after capture. They also sought maintenance from capture to liberation. In No. 11,943 (unlicensed personnel) each appellant claimed war bonus from December 8, 1941 (the date of capture) to October 13, 1945 (the date of crossing the 180th meridian eastbound on repatriation). No. 11,943, A 4.) The average claim was \$3693.33; others ranged from \$3732.11 to \$5185.95. (No. 11,943, A 7.) Each

appellant in No. 11,943 also claimed maintenance at the rate of \$3.75 a day and in the sum of \$5051.25 for the 1347 days he was interned west of the 180th meridian. (No. 11,943, A 7.) Similar claims for war bonus were made by the appellants in No. 11,944 (licensed personnel) in varying amounts ranging from \$4026.49 to \$9023.89. (No. 11,944, A 4, 6.) Each appellant in No. 11,944 also claimed maintenance at the rate of \$6 a day and in the sum of \$8268 for the 1378 days he was interned west of the 180th meridian. (No. 11,944, A 4, 6.)

In both causes a petition for leave to intervene was filed by the appellee United States of America. (No. 11,943, A 52-56; No. 11,944, A 44-47.) Each alleged that under instructions from his government the Swiss Consul at Shanghai had advanced moneys to the appellants at the request of the United States of America, and that repayment thereof in part had been guaranteed by the appellee American President Lines. The purpose of the petitions was to prevent overpayment or double payment in the event appellants were awarded maintenance. No order was made by the District Court on these petitions.

The District Court found that the shipping articles did not entitle appellants to the war bonus they claimed, but that they were entitled to war bonus for the time consumed west of the 180th meridian on the repatriation voyage. (No. 11,943, A 592-597.) The District Court also found that appellants were not entitled to maintenance. (No. 11,943, A 597-598.) By the final decree each appellant in No. 11,943 was

awarded a sum ranging from \$35.82 to \$40.82 for the 17 days he was west of the 180th meridian on the repatriation voyage (No. 11,943, A 602, 608) and in No. 11,944 each appellant was awarded a sum ranging from \$38.62 to 110.62 for whatever number of days he was west of the 180th meridian on the repatriation voyage. (No. 11,943, A 603, 609.)

The question of war bonus for interned seamen was before this court in *Steeves v. American Mail Line*, 9 Cir. 154 F. 2d 24. Appellants rely strongly on the authority of that case for a reversal of the final decree with directions to the trial court to award appellants war bonus as claimed. The question of maintenance for interned seamen is one of first impression. Appellants rely on the general maritime law in support of their position that the District Court should have allowed them maintenance as claimed.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

The assigned errors are the same in each cause, and each appellant relies upon each of his assigned errors, namely, No. (1) to No. (10), both inclusive. (No. 11,943, A 615-616; No. 11,944, A 54-55.)

ARGUMENT OF THE CASE.

1. **THE SHIPPING ARTICLES WERE PLAIN, CERTAIN, AND UNAMBIGUOUS, AND CLEARLY ENTITLED THE LIBELANTS TO WAR BONUS, AT THE RATES STIPULATED THEREIN, FROM THE DATE OF THEIR CAPTURE BY THE JAPANESE TO THE DATE THEY CROSSED THE 180TH MERIDIAN ON THE REPATRIATION VOYAGE.**

Assignment of Error No. 5: "The court erred in finding that the riders attached to the shipping articles were ambiguous, vague, or uncertain." No. 11,943, A 615; No. 11,944, A 54-55.)

Assignment of Error No. 6: "The court erred in finding that the shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as part of the same or a single transaction." (No. 11,943, A 615-616; No. 11,944, A 55.)

A certified copy of the shipping articles here involved was admitted in evidence at the trial as Libelants' Exhibit No. 1 (No. 11,493, A 302/23-24, 304/12-18), and is before this court (No. 11,493, A 622). Attached thereto were the riders quoted in the statement of the case. They were prepared by the respondent and appellee American President Lines. (No. 11,943, A 461/14-20, 541/10-18.)

When the shipping articles were signed on October 15, 1941, it was provided by 45 U.S.C.A., sec. 564 (5):

"The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or

upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the name, and shall contain the following particulars: * * *

Fifth. The amount of wages which each seaman is to receive."

Under the riders to the shipping articles here involved the American President Line agreed to pay the crew a "war bonus" or as it was alternatively termed "an emergency wage increase". That a "war bonus" is "wages" within the meaning of above quoted section 564, is not open to doubt. (*Glandzis v. Callinicos*, 2 Cir. 1944, 140 F. 2d 111, 113-114; *Lakos v. Saliaris*, 4 Cir. 1940, 116 F. 2d 440, 442-443.)

As the law required the shipping articles of the President Harrison to contain "the amount of wages which each seaman is to receive", it is obvious that the law was violated if the shipping articles were indefinite and uncertain as to the amount of "war bonus" each seaman was to receive. The fair assumption, then, is that in preparing the riders for the shipping articles the American President Lines intended telling each seaman unequivocally just what

“war bonus” he would get if he went into a “war zone”. That effect must be given to the riders if it is possible and rational to do so. (*The Capillo* (*Steeves v. American Mail Lines*), 9 Cir. 1946, 154 F. 2d 24, 25.) And to accomplish that effect, moreover, the shipping articles must be most strongly construed against the American President Lines. (*The Thomas Tracy*, 2 Cir. 1928, 24 F. 2d 372, 373; *The Western Cross* (*McDonald v. United States*), 2 Cir. 1923, 292 F. 593, 594-595; *The Florence Olson*, 9 Cir. 1922, 283 F. 11, 12; *The Catalonia*, D. C. Va. 1916, 236 F. 554, 555-556.)

The riders in question refer to “Trans-Pacific” and “Straits Settlements” service. The President Harrison sailed from San Francisco to the Orient and the service was “Trans-Pacific”. By the express terms of the riders the American President Lines agreed to pay a war bonus “from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound”. And by the express terms of the riders the American President Lines agrees to pay this war bonus “while employees are in the war zones defined herein”. That a war zone was defined in the riders, is not susceptible to doubt. When the President Harrison crossed the 180th meridian westbound on its way to the Orient it entered a war zone defined by the riders, and the crew were in that war zone so long as they were in the Orient west of the 180th meridian.

The promise of the American President Lines was to pay war bonuses “*while employees are in the war zones*”. A reasonable construction of this language

will not permit it to be said that it means that the right to war bonuses was conditional upon the employees being in the President Harrison or any other vessel in the war zone. That construction is confirmed when the language is considered with its context. It appears in the second sentence of a separately numbered paragraph covering the situation where the crew might no longer have a vessel. The first sentence of the paragraph provides for payment of basic wages and emergency wages to the date the members of the crew arrive in a Continental United States port “in the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage”. Those particular wages are made payable regardless of whether the vessel becomes a casualty inside or outside a war zone. The second sentence of the paragraph merely continues on with the subject of wages, and provides for the payment of war bonuses *conditional upon the employees being in the defined war zone they were promised war bonuses for entering and for which the vessel headed when it sailed from San Francisco*. Taken with its context the plain meaning of the second sentence of the paragraph is this: “In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, . . . war bonuses at the rate specified . . . shall be paid while employees are in the war zones defined herein”.

Thus it is apparent that the shipping articles here involved were plain, certain, and unambiguous, and clearly entitled the libelants to war bonuses, at the

rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage.

The District Court therefore erred in finding "that the riders attached to the shipping articles were ambiguous, vague, or uncertain" (No. 11,943, A 592), and in finding "that the shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as part of the same or a single transaction" (No. 11,943, A 591-594). (*The Capillo*, 9 Cir. 1946, 154 F. 2d 24, 25-26.)

2. THE COURT ERRED IN ADMITTING ORAL AND WRITTEN EVIDENCE TO CONTRADICT THE TERMS OF THE RIDERS ATTACHED TO THE SHIPPING ARTICLES.

Assignment of Error No. 10: "The court erred in admitting oral and written evidence to contradict the terms of the riders attached to the shipping articles." (No. 11,943, A 616; No. 11,944, A 55.)

Appellants are mindful that courts of admiralty do not adhere to common law rules of evidence (*The Denny*, 3 Cir. 1942, 127 F. 2d 404, 408), and that evidence should be liberally admitted in the trial court, subject to objection, for the benefit of the appellate court where the cause is heard *de novo* (*The Andrea F. Luckenbach*, 9 Cir. 1935, 78 F. 2d 827, 828.) However, "it is not to be supposed that evidence of every sort is competent in admiralty" (*Carson v. American S. & R. Co.*, D. C. Wash. 1928, 25 F. 2d 116, 119), and

evidence should be excluded where "it is so utterly irrelevant and immaterial that there could not possibly be any doubt about it" (*Minnesota S. S. Co. v. Lehigh Valley Tsp. Co.*, 6 Cir. 1904, 129 F. 22, 29).

The vast number of original exhibits before this court on the appeals calls for explanation at this point. These appellants introduced in evidence a certified copy of the shipping articles with riders (Libelants' Exhibit No. 1, No. 11,943, A 304), and the applicable shipowner-union agreements referred to in the riders (Libelants' Exhibits Nos. 2, 3, 4, and 5, No. 11,943, A 304-309).

Respondent American President Lines offered in evidence 209 exhibits of which 117 were merely marked for identification. (No. 11,943, A 417.)

A defense raised by the answers was that the shipping articles of October 15, 1941, were to be interpreted and controlled by decisions of the Maritime War Emergency Board created in December, 1941, and particularly its decision No. 5 of February 21, 1942. (No. 11,943, A 18-22; No. 11,944, A 18-21.) Eighteen exhibits grouped as Respondent's Exhibit B have reference to that defense. (No. 11,943, A 458.) The same defense was urged and held without merit in *The Capillo*, 9 Cir. 1946, 154 F. 2d 24, 25-26. The defense was also held without merit in the present cases. (*Agnew v. American President Lines*, D. C. Cal. 1947, 73 F. Supp. 944, 950.) While it was undoubtedly error to admit these exhibits in evidence, it is obvious, of course, that the error cannot be said to be prejudicial.

Ten exhibits grouped as Respondent's Exhibit C have reference to the issue of maintenance (No. 11,943, A 459), a subject discussed in a later subdivision of this brief.

A defense raised by the answer, and which the trial court sustained, was that the shipping articles were ambiguous and were to be interpreted and controlled by shipowner-union agreements not referred to in the shipping articles. (No. 11,943, A 13-16; No. 11,944, A 12-17.) Sixty-one exhibits grouped as Respondent's Exhibit A have reference to that defense. (No. 11,943, A 434-440.) Some of them duplicate libelant's exhibits. In many instances they consist of agreements, telegrams, and letters bearing dates long after the shipping articles of October 15, 1941, were signed. All were admitted subject to the objection that they were immaterial. (No. 11,943, A 431.) As the shipping articles were unambiguous, it was error for the court to admit these exhibits and testimony supporting them. And as the court based its decision thereon the prejudice from the error is obvious. As to the law, it is enough to quote from *The Capillo*, 154 F. 2d 24, where this court said, at page 25:

"In construing the articles we are controlled by the elementary axiom that, if possible we will give effect to specific contractual language rather than to hold it nugatory. * * * It is a matter of construction whether such union agreements are applicable to make nugatory the specific agreement for the internment."

One hundred and fifteen exhibits were offered in evidence as Respondent's Exhibit H for Identifica-

tion, and the court reserved a ruling as to whether they should be admitted in evidence. (No. 11,943, A 522.) They consisted of various types of riders attached to shipping articles by various shipowners at various times. Appellants were not connected with them in any way. They were immaterial in every sense of the term and merely clutter up the record. The record is silent as to what ruling the trial court ultimately made respecting their admission.

3. THE DISTRICT COURT ERRED IN DENYING LIBELANTS RECOVERY OF WAR BONUS FROM THE DATE THEY WERE CAPTURED BY THE JAPANESE TO THE DATE THEY CROSSED THE 180TH MERIDIAN ON THE REPATRIATION VOYAGE.

Assignment of Error No. 8: "The court erred in finding that respondent was not liable to the libelants and each of them for the payment of war bonus during internment on land or for any period subsequent to December 8, 1941, except for the period of repatriation voyage to a continental United States port until the 180th meridian was crossed westbound (eastbound)." (No. 11,943, A 616; No. 11,944, A 55.)

Assignment of Error No. 2: "The court erred in failing to decree that libelants were and each of them was entitled to the payment of war bonus during internment on land and until the 180th meridian was crossed westbound (eastbound)." (No. 11,943, N 615; No. 11,944, A 54.)

Appellants demonstrated in an earlier subdivision that the shipping articles were plain, certain, and

unambiguous, and clearly entitled the libelants to war bonus, at the rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage. The court therefore erred in finding the contrary. (No 11,943, A 592-594.) The court also erred in finding that respondent American President Lines was only obligated "to pay war bonus during the period of a repatriation voyage until crossing the 180th meridian eastbound." (No. 11,943, A 597.) And the court further erred in decreeing to libelants recovery only of war bonus on the repatriation voyage. (No. 11,943, A 606-609), and failing to decree recovery of war bonus during internment and until the 180th meridian was crossed eastbound.

4. THE DISTRICT COURT ERRED IN DENYING LIBELANTS ANY RECOVERY OF MAINTENANCE.

Assignment of Error No. 9: "The court erred in finding that respondent was not liable to libelants and each of them for the payment or furnishing of maintenance during internment or for a period subsequent to December 8, 1941." (No. 11,943, A 616; No. 10,944, A 55.)

Assignment of Error No. 3: "The court erred in failing to decree that libelants were and each of them was entitled to maintenance during internment on land." (No. 11,943, A 615; No. 11,944, A 54.)

The question here involved is one of first impression. Although the shipping articles expressly pro-

vided for the payment of basic wages, emergency wages, and war bonuses "in the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage", no express provision was made for maintenance in such event.

The right of a seaman to board and lodging at the expense of the ship is a familiar and ancient law of the sea. His right to maintenance or subsistence is an incident to his calling. It is an implied term of every shipping articles he signs. Maintenance or its value is an integral part of the wages he is to receive.

In the early case of *The John L. Dimick*, D. C. Me. 1858, 13 Fed. Cas. 690, Case No. 7355, it was said, at pages 692 and 693:

"The seaman engages to render faithfully all the services that pertain to the navigation of the ship, and all those that are naturally or by custom incident to that duty, as the making slight reparations of the ship in calking or painting the deck or other part of the vessel, which is occasionally required, and also in the loading and unloading the cargo, according to the custom of the trade in which she is engaged. But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship's use, either by fishing or otherwise. On the other hand the seaman stipulates for and the owner promises to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put

in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud on the contract, as it would be to pay their wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach on the law not to furnish a remedy. What difficulties might present themselves in the refined and subtle technicalities of the common law is unnecessary here to inquire. The wrong is not beyond the remedies of the court, professing, like the admiralty, to decide *ex aequo et bono*, on enlarged principles of natural equity and universal justice. The seaman's contract so obviously includes board that it may be deemed unnecessary to refer to authorities in support of this. But the old sea laws were curiously directory on this as well as on other subjects. The *Consolato del Mare* (chapter 145) obliges the master to give the seaman meat three times a week, that is Sunday, Tuesday and Thursday, and wine every morning and afternoon, and double their rations on festival days."

In *The Bouker No. 2*, 2 Cir. 1917, 241 F. 831, it was said, at page 833:

"By the custom of the sea the hiring of sailors has for centuries included food and lodging at the

expense of the ship. This is their maintenance and the origin of the word indicates the kind and to a certain extent the quantum of assistance due the sailor from the ship."

And in *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371, 53 S. Ct. 173, 174, 77 L. Ed. 368, it was said:

"The duty to make such provision is imposed by the law itself as one annexed to the employment. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident."

By the shipping articles the American President Lines promised the seamen their basic wages per month. That the American President Lines was thereby obligated to pay the seamen full basic wages after the termination of the voyage and for the period of their internment and until their repatriation was completed, is not open to dispute. The question, then, is whether the words "basic wages" found in the shipping articles are to be construed as meaning only a specified number of dollars per month, or whether the words are to be construed as meaning a combination of a specified number of dollars per month and maintenance or the fair value thereof. In this respect, as in all others, the shipping articles must be construed most strongly against the American President Lines. (*The Thomas Tracy*, 2 Cir. 1928, 24 F. 2d 372, 373; *The Western Cross* (*McDonald v. United States*), 2 Cir. 1923, 292 F. 593, 594-595; *The Florence Olson*, 9 Cir. 1922, 283 F. 11, 12; *The Catalonia*, D. C. Va. 1916, 236 F. 554, 555-556.)

No one may doubt that under the shipping articles the seamen had a right to wages which included maintenance or the fair value thereof. A reasonable construction of the shipping articles, therefore, is that the words "basic wages" found therein express that concept and connote a combination of specified number of dollars per month *and maintenance or the fair value thereof*. That was the meaning originally given the words by the American President Lines, for it furnished the seamen with maintenance up to the time of their internment. There is nothing in the shipping articles from which it can be said that the words were to have a different meaning if the seamen were interned. On the contrary, the express promise made by the American President Lines in the shipping articles is to continue the payment of "basic wages" after the termination of the voyage. Although it is true that the American President Lines could not directly furnish the seamen with maintenance after their internment, it could still furnish or make available moneys for their maintenance. And as the answers to the libels show, even after the internment of the seamen moneys were advanced to some of them by the Swiss Consul at Shanghai for maintenance, *and the American President Lines guaranteed the repayment* thereof. (No. 11,943, A 22-24, 32-35; No. 11,944, A 21-23.) Clearly, any withholding or deduction by the American President Lines of that part of the "basic wages" of the seamen represented by maintenance or the fair value thereof would be, in the language of *The John L. Dimick*, D. C. Me. 1858, 13

Fed. Cas. 690, 692, Case No. 7355, "just as much a fraud on the contract as it would be to pay their wages in clipped coin or depreciated bank bills", and "a reproach on the law not to furnish a remedy".

The District Court therefore erred in finding that libelants were not entitled to maintenance (No. 11,943, A 597-598), and in failing to award them maintenance (No. 11,943, A 606-609).

5. **THE DISTRICT COURT ERRED IN FINDING AND DECREERING THAT ALL LIBELANTS WERE ENTITLED TO WAS A WAR BONUS ON THE REPATRIATION VOYAGE.**

Assignment of Error No. 7: "The court erred in finding that libelants were only entitled to the amounts decreed them." (No. 11,943, A 616; No. 11,944, A 55.)

Assignment of Error No. 1: "The court erred in decreeing that libelants were entitled only to the sums of money set opposite their respective names in the decree." (No. 11,943, A 615; No. 11,944, A 54.)

The court found that libelants were entitled to a war bonus on the repatriation voyage. (No. 11,943, A 596-597.) It awarded libelants such amounts and no more. (No. 11,943, A 606-609.) This was error. In other subdivisions of this brief it was demonstrated (1) that libelants were entitled to a war bonus from date of capture to date of crossing the 180th meridian eastbound on the repatriation voyage, and

(2) that libelants were entitled to maintenance or the fair value thereof from date of internment to date of liberation.

6. THE DISTRICT COURT ERRED IN FAILING TO AWARD COSTS TO LIBELANTS.

Assignment of Error No. 4: "The court erred in failing to decree costs to libelants." (No. 11,943, A 615; No. 11,944, A 54.)

The court decreed that "the libelants and the respondent shall stand their own respective costs and that neither shall recover costs from the other". (No. 11,943, A 607-608.)

Appellants recognize that courts of admiralty have a wide discretion in giving or withholding costs. (1 American Jurisprudence 615, sec. 139.) But discretion may be abused. "The ancient characterization of seamen as wards of the admiralty is even more accurate now than it was formerly." (*Cortes v. Baltimore Insular Line*, 287 U. S. 367, 377, 53 S. Ct. 173, 176, 77 L. Ed. 368.) The avowed policy of the law is to relieve seamen from costs. (28 U.S.C.A., sec. 837.) Appellants submit that in view of that policy of the law toward seamen the trial court abused its discretion in failing to award them costs.

CONCLUSION.

Appellants therefore respectfully submit that the decree of the District Court should be reversed with directions to the court to award appellants (1) war bonus from the date of their internment to the date they crossed the 180th meridian eastbound on the repatriation voyage, (2) maintenance for the period of their internment, and (3) costs.

Dated, San Francisco,
July 26, 1948.

ALBERT MICHELSON,
Proctor for Appellants.

No. 11,946

IN THE

United States Court of Appeals
For the Ninth Circuit

AUGUST FEDERER, et al.,

Appellants,

VS.

AMERICAN PRESIDENT LINES, LTD., etc.,
et al.,

Appellees.

BRIEF FOR APPELLANTS.

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

HERBERT RESNER,

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240 Montgomery Street, San Francisco 4, California,

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Subject Index

	Page
Statement of Jurisdiction.....	2
Statement of the Case.....	2
Specification of Errors Relied Upon.....	6
Argument	7

I.

The shipping articles were clear, certain, positive and unambiguous, and definitely entitled libelants to war bonus during all of the times they were west of the 180th meridian, which included the period of internment, and until they crossed the 180th meridian eastbound.....	7
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

II.

The court erred in admitting oral and written evidence to contradict the terms of the riders attached to the shipping articles	15
--------------------------------------------------------------------------------------------------------------------------------------	----

III.

The District Court erred in denying appellants maintenance or subsistence during internment.....	18
--------------------------------------------------------------------------------------------------	----

IV.

The District Court erred in finding and decreeing that libelants were entitled only to war bonus on the repatriation voyage	23
Conclusion	25

Table of Authorities Cited

Cases	Pages
Boulton v. Moore, 14 Fed. 922.....	18
Brown v. Lull, 4 Fed. Cases 2018.....	18
Carson v. American S. & R. Co. (D.C. Wash.), 25 Fed. (2d) 116	17
Foster v. Sampson, 9 Fed. Cases No. 4982.....	20
Foreman v. Benas, 247 Fed. 133.....	18
Lakos v. Saliaris (CCA 4), 116 Fed. (2d) 440.....	11
Minnesota SS Co. v. Lehigh Valley Transp. Co. (CCA 6), 129 Fed. 22	17
Northwestern Steamship Co. v. Turtle, 162 Fed. 256.....	18
Steeves v. American Mail Line (The Capillo), (CCA 9), 154 Fed. (2d) 24	6, 14, 15, 16, 17, 25
The Catalonia (DA Va.), 236 Fed. 554.....	11, 18
The Exile, 20 Fed. 878.....	17
The Florence Olson (CCA 9), 283 Fed. 11.....	11
The Glandzis v. Callinicos (CCA 2), 140 Fed. (2d) 111....	11
The John L. Dimmick, 13 Fed. Cases No. 7355.....	20
The Lakme, 93 Fed. 230.....	17
The Thomas Tracy (CCA 2), 24 Fed. (2d) 372.....	11
The Triton, 24 Fed. Cases 14,181.....	17
The Ucayali, 164 Fed. 897.....	18
The Western Cross (CCA 2), 292 Fed. 593.....	11
Thompson v. The Oakland, 23 Fed. Cases 15,971.....	17
Young v. American Steamship Co., 15 Otto 41, 26 L. Ed. 966	8

Statutes

Act of June 7, 1872.....	8
Judicial Code, Section 128 (28 USCA 225, and as amended 28 USCA 1291)	2
28 USCA 41 [3], and as amended 28 USCA 1333.....	2
28 USCA 230, and as amended 28 USCA 2107.....	2
46 USCA 564	8, 10
46 USCA 567	9
46 USCA 568, 575	9
46 USCA 578	9

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AUGUST FEDERER, et al.,

Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD., etc.,
et al.,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal by libelants, merchant seamen, to recover wages (war bonus) and maintenance. This action was consolidated for trial with several others, which are also on appeal to this Court (*Agnew, et al. v. American President Lines*, No. 11,943; *Griffin, et al., v. American President Lines*, No. 11,944; and *Wharton v. American President Lines*, No. 11,945). Libelants have appealed from the final decree entered in this cause because the District Court failed to award libelants war bonus and maintenance as claimed and proved (A.* p. 185). The appeals are presented on typewritten apostles, with the reporter's transcript in common, and the original exhibits and depositions are

*The letter "A" designates Apostles on Appeal, or Clerk's Record; the Reporter's Record will be referred to as "R".

before the Court. The District Court wrote an opinion which is reported at 73 Fed. Sup. 944.

STATEMENT OF JURISDICTION.

This was an action by libelants, merchant seamen, for wages (war bonus) and maintenance. The District Court had jurisdiction (28 USCA 41 [3]; and as amended, 28 USCA 1333). The final decree was entered by the District Court on November 18, 1947 (A, p. 185). Libelants' petition for appeal was filed on November 25, 1947 (A, p. 188), and the appeal was allowed the same day. Citation on appeal was issued on November 25, 1947 (A, p. 190). The appeals were timely (28 USCA 230; and as amended, 28 USCA 2107). Jurisdiction of this Court to review the final decree of the District Court is sustained by § 128 of the Judicial Code (28 USCA 225; and as amended, 28 USCA 1291).

STATEMENT OF THE CASE.

Libelants, merchant seamen, in this case were unlicensed members of the Stewards Department of the *SS President Harrison*, which departed San Francisco on a voyage to the Orient on October 17, 1941. The appellee, American President Lines, was the owner and operator of the vessel. Libelants in this case also were members of the National Union of Marine Cooks & Stewards, formerly known as the Marine Cooks & Stewards Association of the Pacific

Coast. The articles for this voyage were signed on October 15, 1941. A rider was attached to those articles for the benefit of all unlicensed personnel and specifically the libelants in this case, as follows:

“RIDER FOR PASSENGER & FREIGHT VESSELS IN THE
TRANSPACIFIC & STRAITS SETTLEMENT SERVICE

1. The American President Lines agrees to pay an emergency wage increase to the unlicensed crew of the *SS President Harrison*, Voyage 55, as follows:

2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Sailors' Union of the Pacific — Effective October 10, 1939.

Pacific Coast Marine Firemen, Oilers, Water-tenders and Wipers' Association—Effective October 1, 1941.

Marine Cooks and Stewards' Assn. of the Pacific Coast — Effective July 5, 1940.

3. To all employees entitled to receive basic wages of \$120.00 per month or less under said agreement, the sum of \$80 per month.

4. To all employees entitled to receive in excess of \$120.00 per month under said agreement, 66 $\frac{2}{3}$ % of such basic monthly wage.

5. The emergency wage increase to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.

6. In the event the vessel is interned, destroyed or abandoned as a result of war operations and

is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employee shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.

7. In the event the loss of personal effects by any member of the unlicensed crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.

8. War risk insurance in the sum of \$5,000 shall be furnished to members of the crews on this voyage.

AMERICAN PRESIDENT LINES, LTD.

(SEAL)

U. S. SHIPPING COMMISSIONER,

Port of San Francisco, Calif.

/s/ R. A. Frediani."

The *President Harrison* crossed the 180th meridian westbound on October 28, 1941. On December 8, 1941, the vessel was intercepted by the Japanese and the crew attempted to scuttle her. This occurred at Sha-weishan Island, China. The crew left the vessel, but were captured and ordered back to her and worked for a number of days putting her into condition, after

which the vessel proceeded to Shanghai under her own power. Crew members remained aboard until they were put ashore at Shanghai—some on March 5 and others on March 12, 1942.

The internment of the unlicensed personnel by the Japanese west of the 180th meridian lasted from December 8, 1941, until August 15, 1945. Thereafter the appellants were repatriated by the United States Government to continental United States ports. On the repatriation voyage the appellants in this action were west of the 180th meridian for a period of 17 days.

At the time of their discharge at a continental United States port, libelants were paid their basic wages and emergency wages until the date of discharge. They were not paid maintenance. They were also paid war bonus from the date the vessel crossed the 180th meridian westbound on October 28, 1941, until the date of capture by the Japanese on December 8, 1941.

They were not paid war bonuses from the period commencing with their capture by the Japanese west of the 180th meridian and ending with their crossing of the 180th meridian eastbound on the repatriation voyage on October 12, 1945. Nor were they paid any maintenance. The entitlement of libelants to these demands is the question presented to this Court on the instant appeal. It was stipulated by appellee that the payments made to libelants would not constitute a waiver of the claims made in the court below or here (R. 82).

By their libels appellants in this case each sought to recover war bonus (emergency wage increase) in the amount of \$3800, and maintenance for the period of internment at the rate of \$3.75 per day in the amount of \$5,302.50, less whatever sums were paid to libelants through the Swiss Consul during internment (A, p. 6).

The District Court found that the shipping articles did not entitle appellants to the war bonus they claimed during internment, but that they were entitled to war bonus for the time consumed west of the 180th meridian on the repatriation voyage. The District Court also found that appellants were not entitled to recover maintenance. Each libelant was awarded a small sum of money on account of repatriation bonus.

The question of war bonus for interned seamen was considered and determined by this Court in *Steeves v. American Mail Line (The Capillo)*, (9 CCA), 154 Fed. (2d) 24.

Appellants strongly rely upon the *Capillo* decision to support a reversal in this case. The question of maintenance for interned seamen is one of first impression, and it is appellants' contention that under the general maritime law they are entitled to recover maintenance money for the period of internment.

SPECIFICATION OF ERRORS RELIED UPON.

The appellants rely upon all of the errors assigned and specified (A, pp. 191-192).

ARGUMENT.

I.

THE SHIPPING ARTICLES WERE CLEAR, CERTAIN, POSITIVE AND UNAMBIGUOUS, AND DEFINITELY ENTITLED LIBELANTS TO WAR BONUS DURING ALL OF THE TIMES THEY WERE WEST OF THE 180TH MERIDIAN, WHICH INCLUDED THE PERIOD OF INTERNMENT, AND UNTIL THEY CROSSED THE 180TH MERIDIAN EASTBOUND.

Assignment of Error No. 1: "The Court erred in holding the rider governing unlicensed personnel, attached to the shipping articles of the *SS President Harrison*, signed by libelants on October 15, 1941, was in any respect ambiguous, vague or uncertain."

The shipping articles are in evidence as Libelants' Exhibit No. 1. Attached thereto was the rider set forth in full above. The rider was prepared by appellee shipowner American President Lines.

It was the contention of appellee and the finding of the trial court that there was an ambiguity in the shipping articles, to wit, that the term "war zones" was not defined in the rider or articles, and therefore the court was free to consider extrinsic evidence to explain the ambiguity (73 Fed. Sup. 949). In this connection the trial court permitted the supplementary bonus agreements to come into evidence to explain what was meant by "war zones."

With this finding of the trial court appellants must strenuously disagree. In our mind there is nothing ambiguous or uncertain about the rider and the articles. On their face they constitute a full, complete and binding agreement, and the action of the trial

court in permitting extrinsic evidence to explain an alleged ambiguity is not only a perversion of unequivocal language but is also a violation of the basic principles dealing with shipping articles for the protection of merchant seamen.

The statutes of the United States particularly describe the formalities of engaging seamen to go upon foreign voyages. The Act of June 7, 1872, as amended, popularly known as "The Shipping Commissioners Act," was passed to remedy tremendous abuses which were visited upon seamen in the shipping of crews. Prior to the passage of these acts, seamen were shanghaied, shipped through boarding houses, and did not have the protection of written articles. Oftentimes at the end of a long voyage and because of hardships visited upon them by masters of vessels, they deserted rather than claim the small amounts of wages due them. In 1872 a ground swell of indignation led to remedial congressional action. For a discussion see *Young v. American Steamship Co.*, 15 Otto 41, 26 L. Ed. 966. The law provided for the appointment of shipping commissioners in every port of entry which is also a port of ocean navigation of sufficient size to require one, before whom must come all matters pertaining to shipment and discharge of merchant seamen.

Section 564 of Title 46 USCA (part of the Shipping Commissioners Act) provides for written agreements and specifies in great detail what they shall contain. Before starting on any transoceanic voyage, the master of every vessel is obliged to make an agreement

in writing with every seaman whom he carries to sea as one of his crew.

Section 565 promulgates rules governing shipping articles. These are, in brief, that every agreement with exceptions not pertinent to this discussion, shall be signed by each seaman in the presence of a shipping commissioner. The agreement must be in duplicate and one copy is retained by the shipping commissioner and the other is to be delivered to the master. The agreement is to be acknowledged and certified under the hand and official seal of the shipping commissioner.

These rules are rigorously enforced and there are severe penalties for shipping seamen without articles against both the vessel (§ 567) and the master (§§ 568 and 575). All shipments made contrary to the provision of any Act of Congress are void (§ 578).

In the light of these positive requirements, there is no escape from the conclusion that the entire and only contract between libelants and respondent is to be found in the shipping articles, the riders attached thereto, and in the wage scales of the collective bargaining agreements specifically referred to and incorporated therein by reference.

The contract which should have been considered by the court below and which is the sole and only contract between the parties to be considered by this Court on the instant appeal, therefore, insofar as the members of the Stewards Department are concerned, consists of the articles, the rider, and the wage scales

as provided in the agreement between the Pacific American Shipowners Association and the Marine Cooks & Stewards Association of the Pacific, dated July 5, 1940.

It should also be noted that the requirement of the statute is that the master shall make an agreement in writing with every seaman whom he carries to sea as one of the crew (§ 564). In other words, shipping articles do not in any sense of the word constitute a collective bargaining agreement made by a representative of the union with a representative of the shipowners, even though the wage scales and perhaps other provisions contained in the shipping articles are derived from such collective bargaining agreements. The latter, however, are no part of the shipping articles unless incorporated by reference.

The provisions of the Shipping Commissioners Act summarized above are mandatory upon the courts. In the consideration of a seaman's contract of employment the court is confined to the written shipping articles signed by the parties in the presence of the shipping commissioner. Under these circumstances extraneous and extrinsic evidence has no place in the case. There is no ambiguity or uncertainty to resolve in this case. Under the rider to the shipping articles the American President Lines agreed to pay the crew a war bonus, or as it was alternately termed, an emergency wage increase. It was stipulated that these terms meant one and the same thing (R, p. 205). (See also pages 165-187.)

That a war bonus is wages within the meaning of the Shipping Commissioners Act is not open to question.

The Glandzis v. Callimicos (CCA 2), 140 Fed. (2d) 111;

Lakos v. Saliaris (CCA 4), 116 Fed. (2d) 440.

The law required the shipping articles of the *President Harrison* to contain the amount of wages which each seaman was to receive. Therefore the law was violated if the shipping articles were indefinite or uncertain as to the amount of war bonus or wages each seaman was to receive. It is fair to assume in this case that the rider and the articles prepared by American President Lines told each seaman clearly and plainly what his wages, including war bonus, on the voyage would be. Since the articles were prepared by American President Lines, they must be most strongly resolved against that company and any doubt resolved in favor of appellant seamen.

The Thomas Tracy, (CCA 2), 24 Fed. (2d) 372;

The Western Cross, (CCA 2), 292 Fed. 593;

The Florence Olson, (CCA 9), 283 Fed. 11;

The Catalonia (DA Va.), 236 Fed. 554.

The rider in question refers to "Trans-Pacific" and "Straits Settlements" service. When the *President Harrison* sailed from San Francisco for the Orient it was on Trans-Pacific service. By the express term of the rider American President Lines agreed and bound itself to pay a war bonus, emergency wage increase or wages, whatever the term may be, to the unlicensed crew members "from the crossing of the

180th meridian westbound until crossing the 180th meridian eastbound."

By the express term of the rider American President Lines agreed to pay this war bonus "*while employees are in the war zones defined herein.*"

The "*war zones defined herein*" constitute all that area west of the 180th meridian. When the *President Harrison* crossed the 180th meridian westbound and took the crew members into that area, the crew members thereupon entered a "war zone" and remained in that war zone until such time as they crossed the 180th meridian eastbound. It seems to us that this conclusion is not subject to question, and the plain, simple and rational interpretation of the language can lead to no other finding.

We do not think it can be successfully argued that the rider means that war bonus shall be conditioned upon libelants' being attached to the service of the *President Harrison* or some other vessel. In other words, libelants need not be upon a voyage as such in order to recover the war bonus. It is sufficient if they are in the area defined by the articles. That obviously was the intention of the parties at the time the rider was prepared, and if there is any doubt it has to be resolved against American President Lines.

Consider the rider again. Paragraph 6 of the rider provides "In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages * * * shall be paid to the date the

members of the crew arrive in a Continental United States port * * *” It is clear that these monies are to be paid during all of the times from the seaman’s departure from the embarkation port until repatriation. The last sentence of Paragraph 6 of the rider provides: “War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.” That also means that the war bonus shall be paid during all of the times the crew members are west of the 180th meridian.

Paragraphs 3 and 4 of the rider provide that all crew members entitled to receive a basic wage of \$120 per month or less shall be paid the flat sum of \$80 per month as a war bonus or emergency wage increase, and that all crew members entitled to receive in excess of \$120 per month shall be paid 66 $\frac{2}{3}$ % of such basic monthly wages as war bonus or emergency wage increase.

Paragraph 2 provides that in order to determine the wages that are being paid and so arrive at a conclusion whether crew members are earning more or less than \$120 per month reference shall be had to the wage scales in various collective bargaining agreements. The only agreement involved so far as the Stewards Department members are concerned is the collective bargaining agreement of July 5, 1940. This is the only collective bargaining agreement referred to in the rider which specifically affects appellants in the instant case, and the only purpose for referring to this agreement is to determine the rate of pay in

order to calculate war bonus or emergency wage increase.

In the *Capillo* case it was stated by this Court at 154 Fed. (2d) 25:

“It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. It is a matter of construction whether such union agreements are applicable to make nugatory the specific agreement for the internment. The stipulation that \$80.00 per month is the bonus amount if there was an agreement that a bonus was payable for the internment period determines the only unknown factor of the problem.”

In the *Capillo* case the only point of going to the union agreement was to determine the amount of the bonus. So in our case the only purpose for going to the union agreement of July 5, 1940, was to determine rates of pay of crew members in order to determine what the war bonus should be. Outside of that there is absolutely no reason for going to the collective bargaining agreements. Just as the rider was clear and unambiguous in the case of the *Capillo*, so is the rider here clear and unambiguous. It is difficult to contemplate how language could be more specific than in the instant case wherein it is provided that war bonus shall be paid while the seamen are west of the 180th meridian.

It should be recalled and constantly borne in mind that the rider in our case provides for payment of bonus "while employees are in the war zones defined *herein*." *Herein* as used in this rider does not mean some collective bargaining agreement and does not require extrinsic evidence to explain. *Herein* means what it says: the war zone defined in the rider, which clearly is the area west of the 180th meridian.

For example, to again refer to the *Capillo*, 154 Fed. (2d), at page 26, the court says:

"The words 'in effect' do not mean 'hereafter to be made.' "

Similarly the term *herein*, as used in the rider, does not mean "therein" or any other place or different document. The word "herein" means what it says: to wit, the rider, and the rider describes the war zone, presence within which for whatever period of time entitles the crew members to the payment of war bonus.

We submit that the rider was clear, unambiguous, all inclusive, and measures the rights and duties of the parties.

II.

THE COURT ERRED IN ADMITTING ORAL AND WRITTEN EVIDENCE TO CONTRADICT THE TERMS OF THE RIDERS ATTACHED TO THE SHIPPING ARTICLES.

Assignment of Error No. 2: "The Court erred in admitting oral and written evidence to contradict the terms of said rider."

A large volume of extrinsic evidence, to which appellants strenuously objected, was admitted by the trial court in this case, we think erroneously. Appellees introduced literally hundreds of exhibits consisting of collective bargaining agreements, made both before and after the articles were signed, none of which was incorporated in the articles by reference; also decisions of the Maritime War Emergency Board, which was not in existence at the time the articles were signed (this latter was rejected, however, by the trial court and also by this Court in the *Capillo* case). Statements, telegrams from government officials, and even inter-office communications—not a single one of these exhibits was before the shipping commissioner when the articles were signed, and they certainly were not incorporated by reference or otherwise in the articles. Appellee asked the court to find from these extraneous documents that the crew members had made a contract different from that which they had signed and the court erroneously allowed such evidence to be admitted and then relied upon it to make a finding contrary to the law and to the evidence.

These exhibits were bolstered by the affidavits of Eric Nielsen, Secretary of the Maritime War Emergency Board, and by John B. Bryan, President of the Pacific American Shipowners Association, by whom the exhibits were identified, and through whom they were placed in the record over the objection of libelants. None of the 83 exhibits listed in the index to the Bryan deposition, and none of the 18 exhibits listed in the index of the Nielsen deposition (with the

exception of the collective bargaining agreements specifically referred to by dates in the riders) was admissible. While courts of admiralty allow great latitude in receiving evidence, it is not to be supposed that evidence of every sort is competent in admiralty.

Carson v. American S. & R. Co. (D.C. Wash.),
25 Fed. (2d) 116.

Evidence should be excluded where "it is so utterly irrelevant and immaterial that there could not possibly be any doubt about it." (*Minnesota SS Co. v. Lehigh Valley Transp. Co.* (CCA 6), 129 Fed. 22.)

The depositions and exhibits above referred to obviously were incompetent and inadmissible. They certainly should not have been permitted to vary the express provisions of the contract between the parties.

As this Court said in the *Capillo*, 124 Fed. (2d) 25:

"In construing the articles we are controlled by the elementary axiom that, if possible we will give effect to specific contractual language rather than to hold it nugatory. *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 558, 24 S. Ct. 538, 48 L. Ed. 788."

It has been held in any number of cases that extrinsic evidence cannot be received to alter the terms of the shipping articles.

The Triton, 24 Fed. Cases 14,181;

Thompson v. The Oakland, 23 Fed. Cases
15,971;

The Exile, 20 Fed. 878;

The Lakme, 93 Fed. 230;

Northwestern Steamship Co. v. Turtle, 162
Fed. 256;
The Ucayali, 164 Fed. 897;
Foreman v. Benas, 247 Fed. 133.

From these cases it is evident that the specific language of the rider and articles control. There is no need to resort to extrinsic evidence.

Even if the rider was ambiguous, the ambiguity would have to be resolved against respondent American President Lines who prepared it. This is a fundamental proposition.

The Catalonia, supra;
Boulton v. Moore, 14 Fed. 922;
Brown v. Lull, 4 Fed. Cases 2018.

We submit that there was abundant and fatal error in the admission of these extraneous documents which call for a reversal of the decree.

III.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS MAINTENANCE OR SUBSISTENCE DURING INTERNMENT.

Assignment of Error No. 4: "The Court erred in holding that there was no obligation by respondent to pay subsistence during internment."

It is conceded that there is no express agreement in the articles or the rider providing for the payment of subsistence during internment. The only express reference to subsistence is on the first page of the

shipping articles where there is a scale of provisions to be allowed and served out to the crew during the voyage.

Ordinarily, when the voyage is frustrated or abandoned, the articles are dissolved and no further obligation to the seaman from the shipowner exists. Therefore, when the ship was captured by the Japanese, and the voyage became no longer capable of prosecution, the articles would, if special precautions had not been taken, have been dissolved. (46 USCA 593.)

However, before the shipping articles were signed on October 15, 1941, it was well known that the vessel was carrying contraband of war, was subject to capture, and that the crew might be interned. Having these contingencies in mind, it became the custom to attach to articles riders designed to extend the obligation of the shipowner beyond the time when, by frustration of the voyage, the articles would ordinarily be dissolved.

This rider for the unlicensed personnel of the crew of the *President Harrison* was designed for just such purpose. It definitely provided for the payment of wages during the period of internment and until the crew were returned to a continental United States port. It is our contention that this obligation to pay wages during internment carried with it the implied obligation to furnish subsistence during the same period. Wages and subsistence are correlative and as long as the shipowner is under contract to pay wages, he is under obligation, sometimes expressed but always implied, to furnish subsistence.

Foster v. Sampson, 9 Fed. Cases No. 4982 (at page 573):

“The libel also claims compensation for short provisions, in other respects, beside the bread, on the general principles of the maritime law. Proper subsistence is a part of the contract between the owners and seamen. * * *”

The John L. Dimmick, 13 Fed. Cases No. 7355 (at page 692):

“But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship’s use, either by fishing or otherwise. On the other hand the seamen stipulate for and the owners promise to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud in the contract, as it would be to pay them their wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach to the law not to furnish a remedy. What difficulties might present them-

selves in the refined and subtle technicalities of the common law it is unnecessary here to inquire. The wrong is not beyond the remedies of a court, professing, like the admiralty, to decide *ex aequo et bono*, on enlarged principles of natural equity and the universal justice."

It is true that in both these cases the seamen were actually on a voyage and the ship was in commission, and neither case is direct authority for the furnishing of subsistence during a period of internment. It should not be forgotten, however, that had the seamen been on board the vessel under the command of the master, they would as a matter of course have received their subsistence as well as their wages, because to furnish subsistence is, as said above, as much an obligation of the owner as to pay wages.

The purpose of the rider was to preserve the contractual relations between the parties during the period of internment. The rider was a clear recognition of the fact that, in the absence of agreements contained in it, the shipping articles would have been terminated by internment, etc.

In this rider, the appellee clearly and definitely agreed to pay wages, and it is our contention that, having agreed to pay wages, he was similarly obligated to furnish subsistence during the period throughout which wages were being paid. If subsistence is the correlative of wages during a voyage, it is equally a correlative during the period when wages are being paid, even though no voyage is being prosecuted.

In other words, the rider obligates the appellee to duplicate during the period of internment the conditions which would have existed had the ship been prosecuting a voyage. The appellee agreed to take care of the men in either case, and taking care of them means not only paying wages, but also furnishing the men subsistence. This is the obligation implied by the maritime law from the express obligation to pay wages.

However, there is a collective bargaining agreement in this case in evidence (Libelants' Exhibit 6A), the basic collective bargaining agreement between the Marine Cooks and Stewards Association of the Pacific and the Pacific American Shipowners Association, signed July 5, 1940.

Section 7 under subdivision (d) entitled, "Working Rules Applicable on Ships Generally," provides as follows:

"Section 7. When in port and subsistence is not furnished, members of the stewards department shall receive 75 cents per meal and when quarters are not furnished, \$1.50 per day for room."

This provision is inserted as said above, in an agreement dated July 5, 1940, a time when little thought was given to problems of internment. It is probably fair to say that no party to the agreement ever specifically considered the application of this section to problems arising out of internment. Nevertheless the language of the section does not exclude internment, and internment fits the only condition laid down in the section, namely, when in port and subsistence is

not furnished. This is precisely the situation that existed all during the period of internment. Once granted the principle that subsistence is a correlative obligation derived from an express obligation to pay wages, there is no difficulty in applying the express provisions of this Section 7.

If, on the other hand, the Court should find that the parties never intended Section 7 to apply to a case of internment, then we fall back on the principles of the general maritime law that as long as wages are paid, subsistence must be furnished. In this latter case, the amount named in Section 7 (\$3.75 a day) furnishes a fair estimate of the value of subsistence during the period of internment. The amount involved is primarily a question for reference if liability be determined. We submit, however, that appellee should be held liable for subsistence in some amount to be determined, during the period of internment, and until the obligation to pay wages ceased.

IV.

**THE DISTRICT COURT ERRED IN FINDING AND DECREERING
THAT LIBELANTS WERE ENTITLED ONLY TO WAR BONUS
ON THE REPATRIATION VOYAGE.**

Assignment of Error No. 5: "The Court erred in rejecting libelants' proposed amendments to Findings of Fact and Conclusions of Law submitted by respondent."

Assignment of Error No. 6: "The Court erred in settling Findings of Fact and Conclusions of Law in

favor of respondent on the issues of payment of bonus and subsistence to libelants during internment.”

Assignment of Error No. 7: “The Court erred as a matter of evidence in entering a judgment and decree in favor of respondent on the issues of the payment of bonus and subsistence to libelants during internment.”

Assignment of Error No. 8: “The Court erred as a matter of law in entering a judgment and decree in favor of respondent on the issues of payment of bonus and subsistence during internment.”

Assignment of Error No. 9: “The judgments and decrees herein on the issues of payment of bonus and subsistence during internment are contrary to the evidence.”

Assignment of Error No. 10: “The judgments and decrees on the issues of payment of bonus and subsistence during internment are contrary to law.”

Assignment of Error No. 11: “The Court erred in failing to hold on the evidence and on the law that libelants were entitled to recover from respondent bonus and subsistence during internment, and in failing to enter a decree in favor of libelants on these issues.”

We have already discussed the trial court's errors in denying war bonus to libelants, denying maintenance to them, and in allowing extrinsic evidence to be admitted for the purpose of explaining a purported ambiguity in the rider or shipping articles. It is clear that the rider must be considered upon its face since

the law so commands. (*Capillo*, supra.) There is no ambiguity here to be resolved by extrinsic evidence. Even if there were ambiguity, it would have to be resolved against American President Lines which drew the rider. The seamen are entitled to rely upon the contract they made, namely, that they should have war bonus during the period of internment or during all of the times they were west of the 180th meridian. All of that area constituted a war zone, and it is error to resort to collective bargaining agreements not even referred to in the rider or articles to look for a description of war zones. (*The Capillo*, supra.)

So far as maintenance or subsistence during internment is concerned, that is implied in the contract, and we submit that libelants are entitled to that also.

CONCLUSION.

It is respectfully submitted that the trial court is in error and that this Court should enter an order reversing the decree of the court below and directing the entry of a decree as prayed for by the appellants.

Dated, San Francisco, California,

October 15, 1948.

Respectfully submitted,

GLADSTEIN, ANDERSEN,

RESNER & SAWYER,

HERBERT RESNER,

HAROLD M. SAWYER,

Proctors for Appellants.

Nos. 11,943, 11,944, 11,946

IN THE
United States
Court of Appeals
For the Ninth Circuit

JAMES W. AGNEW, JR., et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,943

JOHN W. GRIFFIN, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,944 CONSOLIDATED
CASES

AUGUST FEDERER, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
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Appellee.

No. 11,946

BRIEF FOR APPELLEE

FILED

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Subject Index

	Page
I. Statement of the Case	1
II. The Findings of Fact by the District Court Are Presumptively Correct	10
III. The Issues	11
IV. Argument	13
A. The Applicability of The Capillo Decision.....	13
B. The Supplementary Bonus Agreements Were Effective and Applicable by Their Own Express Terms.....	16
C. The Riders Attached to the Shipping Articles Are Ambiguous and Resort to the Supplementary Bonus Agreements Is Proper and Necessary for Clarification and to Ascertain the Contractual Intent of the Parties.....	17
D. Shipping Articles Have No Greater Sanctity Than Other Contracts in Determining Contractual Intent.....	24
E. The Supplementary Bonus Agreements and the Riders Attached to the Shipping Articles Were Part of the Same Transaction and Must Be Taken Together as a Matter of Construction	31
F. The Supplementary Bonus Agreements, as a Matter of Substantive Law, Prescribe Terms and Conditions That Were Implied Parts of the Shipping Articles and Could Not Be Varied by Individual Contracts of Hire.....	33
G. It Is Clear That the Supplementary Bonus Agreements Do Not Provide for the Payment of War Bonus During Internment	38
H. It Is Equally Clear That the Supplementary Bonus Agreements and the Riders, Taken Together, Do Not Provide for the Payment of War Bonus During Internment.....	40
I. Reference to Other Extrinsic Evidence Overwhelmingly Proves the Parties Did Not Intend to Provide, and Did Not Provide, for the Payment of War Bonus During Internment	44

	Page
J. The Effect of the Decisions of the Maritime War Emergency Board	52
IV. There Is No Merit in the Claim for Maintenance During Internment	56
V. Conclusion	64
Appendix A.....	Appendix 1
Appendix B.....	Appendix 3
Appendix C.....	Appendix 5
Appendix D.....	Appendix 6
Appendix E.....	Appendix 7
Appendix F.....	Appendix 8
Appendix G.....	Appendix 9

Table of Authorities Cited

	Pages
CASES	
Alaska S.S. Co. v. United States, 290 U.S. 256, 54 S.Ct. 159, 78 L.Ed. 302.....	59
Alioto v. Imahashi, 115 F.(2d) 324 (9 C.C.A.).....	11
American Mail Line v. United States, 59 F.Supp. 921.....	59, 62
Arthur v. Baron de Hirsch Fund, 121 F. 791 (2 C.C.A.).....	63
Bailey v. Hannibal & St. J. R.R. Co., 17 Wall. 96, 84 U.S. 96, 21 L.Ed. 611	31
Bigio v. Kerr, 265 U.S. 592, 44 S.Ct. 637, 68 L.Ed. 1196.....	46
Bradley v. The Washington, Alexandria & Georgetown Packet Co., 13 Pet. 89, 38 U.S. 89, 10 L.Ed. 72.....	46, 47
Christiansen v. Local 680 of M.D.&D. Employees, 126 N.J.Eq. 508, 10 A.(2d) 168.....	17, 33, 34
Clayton, et al., v. Standard Oil Co. of N. J., 42 F.Supp. 734, 1942 A.M.C. 61 (S.D. Tex.).....	27, 28, 34
Columbia, Wilson v. W. R. Grace & Company, 4 F.(2d) 673, 675, 1925 A.M.C. 664, 667 (9 C.C.A.).....	46
Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal. App.(2d) 114, 113 P.(2d) 878.....	61, 62
Crist v. U. S. War Shipping Administration, 163 F.(2d) 145, 146 (3 C.C.A.)	10
Dooley v. Lehigh Valley R. Co. of Pa., 130 N.J.Eq. 75, 21 A. (2d) 334	34
Downs v. Wall, 176 Fed. 657, 659 (5 C.C.A.).....	46
Ernest H. Meyer, 84 F.(2d) 496, 501 (9 C.C.A.).....	11
Hawkins v. United States, 96 U.S. 689, 24 L.Ed. 607.....	57
Horlock v. Beal (1916), A.C. 486.....	59
J. I. Case Co. v. N. L. R. B., 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762	17, 33, 34, 35, 36
Jensen v. Franklin, 74 F.(2d) 501 (10 C.C.A.).....	43

	Pages
Marx v. American Malting Co., 169 F. 582, 584 (6 C.C.A.).....	43
Maryland v. Baltimore & Ohio R.R., 22 Wall. 105, 89 U.S. 105, 22 L.Ed. 713 at 714.....	63
Mason v. Texas Co., 76 F.Supp. 318 at 321 (D.C. Mass. 1948)	26, 51, 52, 62
Matson Nav. Co. v. Pope & Talbot, 149 F.(2d) 295 (9 C.C.A.)..	10
Medo Photo Supply Co. v. N. L. R. B., 321 U.S. 678, 64 S.Ct. 830, 88 L.Ed. 1007	35
Mexican Petroleum Corp. of Louisiana v. North German Lloyd, 17 F.(2d) 113, (E.D. La.).....	46
Midland Valley R. Co. v. Railway Express Agency, 105 F.(2d) 201 (10 C.C.A.).....	44
Montoya v. Tidewater Associated Oil Co., 79 F. Supp. 677 (S.D. N.Y.—1948)	52, 53
Newport News Shipbuilding & Dry Dock Co. v. U. S., 34 F.(2d) 100 (4 C.C.A.), (Cert. den.: 280 U.S. 599, 50 S.Ct. 69, 74 L.Ed. 645)	47
Phelps v. Sheldon, 13 Pick. 50 (Mass.), 23 Am.Dec. 659.....	57
Pringle v. Wilson, 156 Cal. 313, 104 Pac. 316.....	43
Reed v. Merchant's Mutual Ins. Co., 95 U.S. 23, 24 L.Ed. 348....	46, 47
Steel v. Louisville & Nashville R.R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 172.....	35
Steeves v. American Mail Line (The Capillo), 154 F.(2d) 24....	9
S.S. India Arrow, 116 F.(2d) 8 (5 C.C.A.).....	20, 21, 22, 23
Tamashita Kisen K. K. v. McCormick Inter. S.S. Co., 20 F.(2d) 25 (9 C.C.A.).....	11
Tawada v. U. S., 162 F.(2d) 615, 617 (9 C.C.A.).....	11
Thames v. Pac. S.S. Lines, Ltd., 84 F.(2d) 506 (9 C.C.A.).....	11
The Boston Maru, 20 F.(2d) 508 (9 C.C.A.).....	11
The Croxteth Hall and The Celtic, 143 L.T.Rep. 316 (1930), P. 179, 18 Asp. Mar. L. 121 (Affirmed by the House of Lords, 18 Asp. Mar. L. 184)	60, 61
The Denny, 127 F.(2d) 404 (3 C.C.A.).....	46
The Edna, 291 F. 379 at 380 (N.D. Cal.).....	59, 60
The Edna, 292 F. 640 (N.D. Cal.).....	59

	Pages
The Pennsylvanian, 149 F.(2d) 478 (9 C.C.A.).....	11
The Saratoga, Fed. Cas. No. 12,355.....	59
The Vivid, 4 Ben. 419, 28 Fed. Cas. 1234, Fed. Case No. 16978 (E.D. N.Y.)	45
Union Water Co. v. Lewiston, 101 Me. 564, 65 A. 67.....	42
United States v. Lubinski, 153 F.(2d) 1013 (9 C.C.A.).....	11
Vital v. Kerr, 297 F. 959, 968-9 (2 C.C.A.) (Cert. den.).....	46
Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., 40 F.Supp. 378 (W.D. N.Y.), Affirmed 129 F.(2d) 319 (2 C.C.A.)	46

STATUTES

California Civil Code, Sec. 1642.....	31
U.S.C., Title 46, Sec. 593.....	59
46 U.S.C. 564	62
46 U.S.C. 593, 678.....	62
46 U.S.C.A. 564.....	26

TEXTS

12 Am. Jur. 505, Par. 7.....	57
12 Am. Jur. 779.....	43
Benedict on Admiralty, 6th Edition, Volume 3, page 5, section 381(b)	45
Williston on Contracts, Revised Edition, Secs. 619, 624.....	42

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No. 11,946

BRIEF FOR APPELLEE

I.

STATEMENT OF THE CASE

The *S.S. President Harrison*, owned by the appellee, American President Lines, Ltd., opened shipping articles on October 15, 1941, covering a voyage from San Francisco westward to Manila

and other trans-Pacific ports. The vessel sailed from San Francisco on October 17, 1941, arrived at Manila, and sailed from Manila on December 3, 1941, to Chinwangtao, China, to evacuate United States Marines and civilians of American citizenship pursuant to the request of the United States Navy Department. On December 8, 1941, the *President Harrison* was overtaken and seized by the Japanese after grounding on Shaweishan Island, China. The crew members of the vessel were subsequently interned by the Japanese in and about Shanghai until on or about August 15, 1945, when the surrender of the Japanese brought about their liberation from internment.

The crew members were then repatriated to Pacific Coast ports of the United States and, upon their arrival, were paid wages by appellee for the entire period of their internment in addition to whatever wages and war bonus were still owing them at the time of the vessel's capture and their internment.

The eighty-five appellants in these three consolidated causes on appeal were all former crew members of the *President Harrison*, whose crew complement during the voyage in question consisted of one hundred and seventy-two members. The appellants were members, according to their ratings, of various maritime labor unions who had various collective bargaining agreements with the appellee and other Pacific Coast shipowners (589-591).* The collective bargaining agreements prescribing the wages, hours, and working conditions of such crew members are called "basic agreements." Since 1936, the Pacific American Shipowners Association (P.A.S.A.), of which appellee is a member, has negotiated these collective bargaining agreements with the various maritime labor unions involved. New basic agreements were negotiated between the P.A.S.A. and these maritime labor unions on various dates in October and November, 1941 (Bryan's Ex. 55, 56, 57, 58, and 59). All of the new basic agreements provided for a wage increase which

*Unless otherwise noted, all page references herein are to the Apostles on Appeal in case No. 11,943.

was termed an "emergency wage." The new basic agreements were entered into between October 31, 1941, and November 28, 1941 (Bryan's Ex. 55, 57, 58, and 59), except one, which was executed on October 1, 1941 (Bryan's Ex. 56). All the agreements, however, were, by their express terms, effective retroactively to October 1, 1941.

Accordingly, upon their repatriation to San Francisco, the appellees were paid wages for the period of their employment aboard the vessel before internment and for the period of their internment and repatriation at the increased rates provided by the new basic agreements, which were higher than those stated in the shipping articles (523-524; 530-532; Ex. 1). War bonuses paid to the appellants during their employment aboard the vessel prior to her capture were also computed on the basis of these increased wage rates prescribed by the new basic agreements (520-523).

In addition to basic agreements prescribing wages, hours, and working conditions for crew members employed aboard vessels operated by members of the P.A.S.A., the P.A.S.A. and the same various maritime labor unions negotiated and entered into other supplementary collective bargaining agreements covering the payment of war bonuses to crew members employed aboard vessels operated by members of the P.A.S.A. These agreements were commonly known as "supplementary bonus agreements." There were four series of such agreements. The first series were entered into between April 30 and July 5, 1940, after the outbreak of World War II in Europe (Bryan's Ex. 11, 12, 13, 14, and 15). The second series were all dated February 10, 1941 (Bryan's Ex. 17, 18, 19, 20, and 21), and the third series were all entered into on May 19, 1941 (Bryan's Ex. 22, 23, 24, 25, and 26). The first three series of these supplementary bonus agreements fixed the rates of war bonus payable to crew members and the conditions under which war bonus was payable. Between the third and fourth series of supplementary bonus agreements, to wit, on August 16, 1941, a special, nationwide

and uniform agreement relating to war bonus was entered into between unions representing licensed deck and engine room officers and representatives, including the P.A.S.A., of vessel operators on the Pacific, Atlantic, and Gulf Coasts (Bryan's Ex. 34).

The fourth series of supplementary bonus agreements, and the ones with which the issues in these appeals most directly are concerned, were entered into on various dates in October, 1941, as follows: Sailors Union of the Pacific (S.U.P.), October 9, 1941 (Bryan's Ex. 47); Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association (M.F.O.W.W.), October 9, 1941 (Bryan's Ex. 48); Marine Cooks & Stewards Association of the Pacific Coast (M.C.&S.), October 10, 1941 (Bryan's Ex. 50); National Organization of Masters, Mates and Pilots of America (M.M.&P.), October 20, 1941 (Bryan's Ex. 49)*; Marine Engineers Beneficial Association (M.E.B.A.), October 15, 1941 (Bryan's Ex. 51).

The fourth series of supplementary bonus agreements increased the rates of war bonus payable to crew members employed aboard vessels operated by members of the P.A.S.A. and also determined the conditions under which such war bonus was payable. In addition, however, and unlike the first, second, and third series of supplementary bonus agreements, the fourth series of these agreements contained a provision specifically covering the contingency of a vessel's being interned, destroyed, or abandoned as a result of war operations. This specific provision in the supplementary bonus agreements with the S.U.P., the M.F.O.W.W., and the M.C.&S. (Bryan's Ex. 47, 48, and 50) is identical, and reads as follows:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew

*The mimeographed copy of this agreement introduced as such exhibit erroneously shows the date as October 10, 1941.

arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

A similar, specific provision is contained in the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. (Bryan's Ex. 49 and 51) and reads as follows:

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.

"While employees are in the war zone areas described herein, war bonuses shall also be paid to them at the rate of 66 $\frac{2}{3}$ % of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

Prior to the fourth series of supplementary bonus agreements, the appellee used a rider on shipping articles containing the following provision:

"In the event the vessel be interned and for that reason be unable to continue her voyage, the company agrees to pay wages including emergency wage increase, to the dates members of the crew arrive in a continental United States port; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a continental United States port."

This form of rider was attached to the shipping articles of the *S.S. Perida*, which sailed on September 24, 1941 (Ex. D; 495), and the same form of rider was used by appellee on thirty-three other occasions in 1941 prior to October 3 (Ex. H; Appendix C). This form of rider was attached to the shipping articles of the *S.S. President Van Buren*, which were opened in New York on October 9, 1941, but the first of the fourth series

of supplementary bonus agreements executed in San Francisco that day was immediately reflected by the following clause added to the rider:

"The agreement of October 9 between the Sailors Union of the Pacific and Pacific American Shipowners Association relative to war bonuses shall apply to this voyage."

After the supplementary bonus agreements of the fourth series containing the specific internment provision first quoted above were consummated, the form of rider employed on shipping articles by the appellee was changed to conform. The new form of rider was used by the appellee for voyages commencing after October 9, 1941 (Appendix D). The revised internment provision contained in the new form of rider applicable to unlicensed personnel, which form was attached to the shipping articles of the *President Harrison* on the voyage in question, reads as follows:

"In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

The licensed personnel rider attached to the shipping articles of the *President Harrison* for the voyage in question contains the same provision except for reference to different bonus rates, as shown below:

"In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions

shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses at the rate specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein."

As admitted by the appellants and found by the District Court, the appellee paid to the respective appellants, following their repatriation, basic wages and emergency wages from December 8, 1941, the date of internment, to the respective dates the libelants arrived in a continental United States port. The amounts of these payments are set forth in the schedules attached to the answers of the appellee to the respective libels, and it was stipulated at the trial that these schedules accurately reflect the payments made to the appellants (No. 11,943, A. 28; No. 11,944, A. 26; No. 11,946, A. 132). These payments of wages and emergency wages for the entire period of internment varied according to the ratings of the appellants from amounts in excess of \$3,800 to a maximum of \$17,964.92. Other payments were made covering wages, emergency wages, and war bonuses for the period of employment aboard the vessel up to the date of the vessel's capture and the internment of the crew.

The appellants in these actions, in addition to the payments already made to them by appellee, are seeking the recovery of war bonus and an allowance for maintenance during the entire period of their internment on land. In respect to their claim for war bonus during the period of internment, the appellants contend that the shipping articles and riders attached thereto constitute the entire and only contract between the appellants and the appellee relating to the payment of war bonus and that the riders clearly provided for the payment of war bonus to the appellants during the period of their internment.

After hearing the testimony of witnesses and considering the evidence and written briefs of counsel, the District Court re-

jected these contentions of the appellants. The findings and conclusions of the District Court (586-600) may be summarized as follows:

The claim for war bonus during internment is dependent upon contract, but the contract consists not only of the shipping articles, with the attached riders, but also of the supplementary bonus agreements entered into with the various maritime labor unions in October, 1941. These supplementary bonus agreements, by their own express terms, were in effect at the time in question and were applicable to this voyage of the *President Harrison*. Furthermore, the riders attached to the shipping articles are ambiguous and uncertain in that, while they provided that war bonus "shall be paid while employees are in the war zones defined herein," there are no war zones defined therein as such, either geographically or otherwise. Resort to the supplementary bonus agreements is necessary to determine the real contractual intent of the parties, and such intent cannot and should not be determined from the riders alone. The supplementary bonus agreements are collective bargaining agreements and are implied parts of the shipping articles and the attached riders. The shipping articles and attached riders and the supplementary bonus agreements are related to the same matters, were entered into by and in behalf of the same parties at substantially the same time, and are parts of substantially one transaction, and must be taken and construed as parts of the same or a single transaction. The supplementary bonus agreements actually cover the subject of war bonus in greater detail and with more explicit and specific provisions than the riders attached to the shipping articles, and any inconsistency between the shipping articles, with the attached riders, and the supplementary bonus agreements must be controlled by the latter. The war risk zones or areas defined in the supplementary bonus agreements are fundamentally voyages and the zone, area, or voyage specifying what war bonus was payable to the appellants is restricted so as to include only that portion of the voyage

involved after crossing the 180th meridian westbound and re-crossing the same meridian eastbound. The supplementary bonus agreements do not provide for the payment of war bonus to appellants during their internment on land. The appellants were paid war bonus for that portion of the voyage after the *President Harrison* crossed the 180th meridian westbound to December 8, 1941, and were paid basic wages and emergency wages during their internment from December 8, 1941, to the respective dates of their repatriation to a continental United States port as provided by the riders and the supplementary bonus agreements. The appellants are entitled to further war bonus payments only for the period of their repatriation voyage until crossing the 180th meridian eastbound. War bonus during that period of the repatriation voyage, computed at rates and in the manner prescribed by Decisions 2-C and 2-D of the Maritime War Emergency Board, was tendered in good faith by appellee to appellants, but this method of computation is erroneous. The articles with attached riders and the supplementary bonus agreements fix the rates of, and the manner of computing, war bonus during the repatriation voyage, and the appellants are entitled to recover war bonus so computed for that portion of their repatriation voyage before crossing the 180th meridian eastbound. The appellants are not entitled to recover maintenance during internment. There is no express or implied agreement obligating the appellee to pay maintenance while the appellants were interned.

As indicated in its written decision (561-582; 73 F. Supp. 944) the District Court, in reaching the foregoing conclusions, found support and precedent, particularly in construing the supplementary bonus agreements, in the decision by this court in *Steeves v. American Mail Line (The Capillo)*, 154 F.(2d) 24. The District Court adopted the interpretation given by this court of these supplementary bonus agreements to the effect that war zones or areas are defined therein in terms of voyages and do not pertain to land areas and that the agreements do not pro-

vide for payment of war bonus during internment on land. The District Court also pointed out that *The Capillo* decision by this court differs from the present case in a respect which serves to emphasize the validity of the District Court's conclusion. In *The Capillo* decision, this court, as between the rider attached to the shipping articles and the supplementary bonus agreements, chose the rider as the document measuring the rights of the parties because of the specificity of its applicable provisions, which unequivocally obligated the shipowner to pay war bonus during the internment of the crew. No ambiguity in that rider required clarification. The *President Harrison* riders, however, so incompletely define "war zones" as to create the ambiguity which compels resort to the supplementary bonus agreements for clarification and for determination of what the parties meant by the contract they made.

II.

THE FINDINGS OF FACT BY THE DISTRICT COURT ARE PRESUMPTIVELY CORRECT

Before defining the issues or commencing our argument in support of the decision and final decree of the District Court, it is appropriate to appraise the manner in which this Court should approach the findings of fact by the District Court.

Although an appeal in admiralty opens the case for a trial *de novo*, findings of fact made by the District Court are entitled to the greatest weight. *Matson Nav. Co. v. Pope & Talbot*, 149 F.(2d) 295 (9 C.C.A.). This is especially true where they are based upon testimony given in open court, and their weight is modified if they are wholly based upon depositions. *Crist v. U. S. War Shipping Administration*, 163 F.(2d) 145, 146 (3 C.C.A.). If the findings are made both upon oral testimony and upon depositions submitted, they merit more consideration than if made after hearing of evidence by deposition alone, and an appellate court, in deciding they should not be disturbed unless contrary to the clear result of the evidence, is

restricted only by the dictates of its own judicial discretion. *United States v. Lubinski*, 153 F.(2d) 1013 (9 C.C.A.); *Tamashita Kisen K. K. v. McCormick Inter. S.S. Co.*, 20 F.(2d) 25 (9 C.C.A.).

The above principle was enunciated by this court as a "rebuttable prima facie presumption" that the findings of the District Court are correct and has consistently been followed. *Ernest H. Meyer*, 84 F.(2d) 496, 501 (9 C.C.A.). In those cases where all the evidence pertinent to the finding is given by deposition, there is a "lighter presumption in favor of the decision of the lower court." *Alioto v. Imabashi*, 115 F.(2d) 324 (9 C.C.A.). But where some of the evidence is by deposition and a substantial part is heard in open court, this court recognizes a "rebuttable presumption of correctness." *Tawada v. U. S.*, 162 F.(2d) 615, 617 (9 C.C.A.).

See also:

Thames v. Pac. S.S. Lines, Ltd., 84 F.(2d) 506 (9 C.C.A.);

The Pennsylvanian, 149 F.(2d) 478 (9 C.C.A.).

It has consistently been held that, when part of the testimony is received in court and part by deposition, the District Court "findings should not lightly be disregarded." *The Boston Maru*, 20 F.(2d) 508 (9 C.C.A.).

III.

THE ISSUES

In their brief, the appellants attack as error the consideration by the District Court of the supplementary bonus agreements for the purpose of determining the contractual intent of the parties in respect to the payment of war bonus in the event a vessel be interned, destroyed, or abandoned as a result of war operations and unable to continue her voyage. The appellants do not argue that the supplementary bonus agreements provide for the payment of war bonus during internment. They strive to persuade this court, as they did the District Court, that the

shipping articles and the riders attached thereto are the only documents that control the contractual relationship between the parties. They would have this court ignore and give no effect to these collective bargaining agreements, which, by their own express terms, were applicable and in effect. They contend that the riders attached to the shipping articles clearly provide for the payment of war bonus during all of the times that the appellants were west of the 180th meridian, including the period that they were no longer aboard the vessel and were interned on land.

While contending that the riders attached to the shipping articles, even when construed alone, do not provide for the payment of war bonus during the period of internment, the appellee contends that the collective bargaining agreements, consisting of the supplementary bonus agreements, also control the contractual rights and obligations of the appellants and appellee and that these agreements and the shipping articles with the riders attached must be construed together in determining the contractual intent of the parties.

The appellee further contends that, when these documents are taken together, they clearly do not provide for the payment of war bonus during the period of internment. Appellee's contentions, of course, accord with the conclusions reached by the District Court, and, as we shall later point out in more detail, this contended construction of the supplementary bonus agreements accords with *The Capillo* decision by this Court.

Accordingly, while the interpretation of the riders attached to the shipping articles, unaided by reference to any other document or evidence, is also an issue, the principal question involved in these consolidated appeals is whether the District Court was correct in considering and giving effect to the supplementary bonus agreements, which both this Court and the District Court have construed as not providing for the payment of war bonus during internment.

The right of the appellants to recover maintenance during their internment is a separate question and will be discussed independently following the discussion relating to the claim for war bonus during internment.

IV.

ARGUMENT

A. The Applicability of The *Capillo* Decision.

The appellants, in both opening briefs, embrace *The Capillo* decision by this court and assert that strong reliance is placed on the same to support a reversal of the final decree of the District Court. At the outset, we wish to make it clear that we embrace *The Capillo* decision by this court with equal affection and, we submit, with more legitimate right. We find in such decision, as did the District Court, clear support for its conclusions.

To what extent does *The Capillo* decision by this court serve as a precedent for deciding the issues involved in these consolidated appeals? We have heretofore quoted the specific provisions contained in the supplementary bonus agreements and in the riders attached to the articles of the *President Harrison* dealing with the eventuality of the internment, destruction, or abandonment of the vessel as a result of war operations. For convenience of reference and for the purpose of comparison, we set forth below the provision dealing with similar eventuality contained in the rider attached to the articles of the *Capillo*:

"In the event the vessel *and/or crew be interned, imprisoned, hospitalized, or put ashore** due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages *and bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes."

*Emphasis by italics supplied.

The rider just quoted differs in many material respects from the riders attached to the *President Harrison* articles. It will be noted that the *Capillo* rider refers not only to the internment of the vessel, but also to the internment, imprisonment, hospitalization, and putting ashore of the crew. It will also be noted that the rider specifically and expressly provides that, in such event, "the company agrees to pay wages *and bonus* to the date members of the crew arrive in an United States port." The term "bonus" is coupled with the term "wages." The joining of these two types of payment is the natural method of drafting such a provision if it be intended that war bonus as well as wages are payable to crew members during their internment. The payment of war bonus to the crew in the event of their internment as well as wages is related in no respect to war zones in the *Capillo* rider. The provision is specific that, if the crew is interned, they should be paid both wages and bonus until their arrival in a United States port. In the supplementary bonus agreements and in the riders attached to the *President Harrison* articles, the obligation to pay war bonus follows the provision obligating the shipowner to repatriate the crew to a continental United States port and is limited to the period when the crew members are in war zones.

This court, in *The Capillo* decision, stated that it was controlled by the elementary axiom that effect be given, if possible, to specific contractual language in preference to the same being held nugatory. To give effect to the specific agreement of the shipowner to pay the crew war bonus as well as wages in the event of their internment, this court ruled that the supplementary bonus agreements were inapplicable in that, to give effect to their clear, contrary provisions, the specific obligation to pay war bonus during internment would be rendered meaningless and of no effect.

As pointed out by the District Court in its written decision (570; 73 F. Supp. 949), there is nothing in the *President Harrison* riders or in any other evidence "to support even an in-

ference that the riders were actually intended to enlarge the scope of the war bonus guaranties contained in the applicable supplementary bonus agreements. At best, the language of the riders indicates an inartful attempt to incorporate the bonus provisions of the supplementary agreements into the articles. As a result, the so-called war zones were so incompletely defined as to create the ambiguity which in turn requires resort to the supplementary agreements for clarification." As already pointed out, the District Court found and concluded that the supplementary bonus agreements covered the subject of war bonus in greater detail and with more explicit and specific provisions than the riders attached to the shipping articles. There being no specific language providing for the payment of war bonus during internment, the *President Harrison* riders present no problem as existed in *The Capillo* case about giving effect to such specific provisions in preference to the same being held nugatory. In fact, the same axiom may be invoked in the opposite direction in the present case to give effect to the specific language contained in the supplementary bonus agreements rather than render the same meaningless. Having reached the conclusion that the supplementary bonus agreements must be given effect according to their express provisions, the District Court found no difficulty in reaching the conclusion that these collective bargaining agreements do not provide for war bonus during internment on land. The same conclusion was reached by this court in *The Capillo* decision, where the supplementary bonus agreement with the Pacific Coast Marine Firemen, Oilers, Wipers & Watertenders Association of October 9, 1941 (Bryan's Ex. 48) and the supplementary bonus agreement of October 10, 1941 with the Marine Cooks and Stewards Association of the Pacific Coast (Bryan's Ex. 50) were considered. In construing these supplementary bonus agreements and comparing their provisions with those contained in the *Capillo* rider, this court ruled as follows (154 F.(2d) 24 at 25):

"Since, if rational, we must construe the second paragraph to give effect to its agreements, we construe the pro-

vision of the union agreement for period of bonus during the return voyage of the ship to the 180th meridian as not 'applicable' to the specific agreement to pay one during the period of captivity after the ship's destruction in Manila.

"The same is true of the cooks and stewards union agreement. There, the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian. It is not applicable to a case of the destruction of the vessel and the subsequent period of captivity and repatriation specifically provided for in the second paragraph of the rider.

"It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles."

Having in mind the conclusions reached by this court in *The Capillo* case and the effect given this decision by the District Court in the present case, we may now proceed to discuss in more detail the many reasons that compel the supplementary bonus agreements to be considered with the riders attached to the *President Harrison* shipping articles and that support the final conclusion that neither such riders nor such supplementary bonus agreements provide for the payment of war bonus during internment.

B. The Supplementary Bonus Agreements Were Effective and Applicable by Their Own Express Terms.

The libels and contentions of appellants are predicated upon the proposition that the shipping articles and the attached riders constitute the sole contract between the appellants and the appellee. Appellants do not attempt to explain how or why collective bargaining agreements between the parties, which, by their own express terms, were applicable and in effect, can be

peremptorily dismissed and ignored. A cursory examination of these supplementary bonus agreements entered into in October, 1941, discloses that, by their own express provisions, the same were made automatically effective and applicable to all voyages, shipping articles for which were entered into on or after August 16, 1941 (Section 6 of Bryan's Ex. 47, 48, and 50; Section 1 of Bryan's Ex. 49 and 51). Since the shipping articles of the *President Harrison* were entered into on October 15, 1941, the supplementary bonus agreements, by their specific terms, applied to this voyage.

Being in effect, operative, and applicable by their own express provisions, these collective bargaining agreements must be construed as valid, enforceable, and binding upon the parties. A collective bargaining agreement has been described as "an accord as to the terms which will govern hiring and work and pay," and after a collective bargaining agreement has been consummated, "there is little left to individual agreement except the act of hiring." *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762. Although the original concepts of the nature of collective bargaining agreements gave them limited effect, "gradually, however, courts have come to the position that the collective bargaining agreement gives rise to valid, enforceable obligations, binding both the employer and the employee." *Annotation*, 88 L.Ed. 773; *Christiansen v. Local 680 of M.D.&D. Employees*, 126 N.J.Eq. 508, 10 A.(2d) 168.

C. The Riders Attached to the Shipping Articles Are Ambiguous and Resort to the Supplementary Bonus Agreements Is Proper and Necessary for Clarification and to Ascertain the Contractual Intent of the Parties.

The District Court found that the "riders attached to the shipping articles are ambiguous and uncertain in that, while they provide that war bonus 'shall be paid while employees are in the war zones defined herein,' there are no war zones defined therein as such, either geographically or otherwise" (592). The

District Court further found that "Resort must be made to the supplementary bonus agreements in order to determine the real contractual intent of the parties in respect to the claim of the libelants for war bonus during their internment from December 8, 1941, to their repatriation to and arrival at a continental United States port" and that "Such intent cannot and should not be determined from the riders alone" (592-593).

One obvious ambiguity that appears in the riders attached to the shipping articles arises from the use of the term "emergency wage increase." This term is used in paragraph 1 of the riders for both the licensed and the unlicensed personnel, and also in paragraph 3 of the rider for licensed personnel and in paragraph 5 of the rider for unlicensed personnel. However, it was stipulated at the trial that the term "emergency wage increase," as used in these particular provisions of the riders, meant "war bonus" (588-589). The riders for the licensed and the unlicensed personnel, using the stipulated term "war bonus" in substitution for the term "emergency wage increase" are set forth in Appendix A and Appendix B attached hereto. The term "emergency wage increase" used in the respects noted is not to be confused with the term "emergency wages" used in paragraph 4 of the rider for the licensed personnel and in paragraph 6 of the rider for unlicensed personnel. All counsel agreed that the term "emergency wage" used in the internment provisions of the riders did not mean war bonus (513). The term "emergency wage" describes what, in essence, amounted to an increase in the basic wages paid to the crew members. This increase also was prescribed by the basic agreements (505-506).

The most significant ambiguity appears in the second sentence of paragraph 4 of the rider for licensed personnel and the second sentence of paragraph 6 of the rider for unlicensed personnel. These two provisions state that "war bonuses shall be paid while employees are in the war zones defined herein." The District Court found as we contend, that no definition of war zones is contained in the riders.

Appellants contend that the term "war zones," as used in the provisions of the riders just quoted, is defined in the paragraph in each rider which reads as follows:

"This emergency wage increase [i.e., war bonus] to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound."

As stated by the District Court in its written decision (73 F.Supp. 947), "There is no other language in the rider which by any stretch of the imagination could supply the missing definition of 'war zones.'"

In the supplementary bonus agreements with the unions representing unlicensed personnel (Bryan's Ex. 47, 48, and 50), the following definition of war zones is set forth:

"1. The following war bonus rules shall govern the parties hereto—

a) There shall be five war risk zones; namely:

* * * * *

III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)"

A similar definition is contained in the supplementary bonus agreements with the unions representing licensed personnel (Bryan's Ex. 49 and 51) as follows:

"(2.) War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows:

* * * * *

Area IV. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula.

* * * * *

"Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows:

Area IV. $66\frac{2}{3}\%$ of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound."

The identical provision contained in paragraph 3 of the rider for licensed personnel and paragraph 5 of the rider for unlicensed personnel, which appellants contend constitutes a definition of the term "war zones," coincides with the provisions of the new supplementary bonus agreements just quoted delimiting the portion of such trans-Pacific voyage during which war bonus is payable. These provisions are not definitions of war zones. The war zone is the trans-Pacific voyage specified in the supplementary bonus agreements, and these provisions are words of restriction confining the war zone voyage to that portion west of the 180th meridian.

The District Court, in the light of these circumstances, most assuredly was justified in concluding that the riders did not contain a definition of war zones and that "At best, the language of the riders indicates an inartful attempt to incorporate the bonus provisions of the supplementary agreements into the articles" (570; 73 F.Supp. 949). There can be no doubt also that, with such incompleteness and ambiguity in the riders, the District Court was further justified in admitting and considering extrinsic evidence consisting, among other things, of the supplementary bonus agreements to supply the incomplete or missing war zone definition. In this connection, it should be remembered that the internment clause of the riders was revised to conform to the internment clause contained in the supplementary bonus agreements entered into only a few days previously. This revision introduced into the riders for the first time the provision for paying war bonus while employees were in war zones following the provision obligating the shipowner to repatriate the crew (see Appendix C and Appendix D). With the riders thus revised being silent, incomplete, or ambiguous in respect to a definition of the war zones, can the right to consider the so recent genesis of the term "war zones" be seriously doubted?

The case of the *S.S. India Arrow*, 116 F.(2d) 8 (5 C.C.A.) is remarkably similar to the present case. There, a libel was filed by the crews of two vessels seeking the recovery of a bonus for

each seaman under contracts to pay such bonus if the ship should call at Spanish ports. The sole question was whether Santa Cruz de Tenerife, in the islands off the west coast of Africa, was a Spanish port within the meaning on the contracts. The similarity of this case to the present one and the pertinency of the court's rulings warrant quotation from the decision at some length.

"The answers conceded that the port of Santa Cruz de Tenerife was in a general sense a Spanish port, but contended that it was not as the term was used in the contracts, and that the expression was ambiguous and explainable; or if not it prayed to reform the contracts to express the mutual intent more clearly. The district judge thought the contracts clear and apparently rejected from consideration the evidence touching their genesis. In our opinion 'Spanish ports' may mean either ports in Spain, or ports belonging to Spain. The evidence shows, as we judicially know, that the Canary Islands are hundreds of miles away from Spain, so that their ports are not in Spain and not Spanish ports in a geographical sense; but the Canary Islands are administratively a part of Spain, so that ports there are Spanish ports from a political standpoint. 'Spanish river', or 'Spanish mountain', would mean a river or mountain in Spain, but the expression Spanish port is fairly ambiguous. It is therefore proper to consider evidence of the circumstances and the intentions of the parties in their use of it.

"The evidence shows without conflict that during the Spanish Civil War, on September 23, 1937, the United States Maritime Commission agreed to pay a cash bonus of \$50 on government operated vessels which entered danger zones in Chinese and Spanish waters, and if vessels were interned to pay wages during such delay, defining the Spanish waters meant as 'Territorial waters of Spain, Spanish Morocco and the Balearic Islands, including waters between the Balearic Islands and the Spanish mainland.' On September 29, 1937, the Export Steamship Corporation and the National Maritime Union, by M. Byne (it being the union of which libellants are members), made a contract for a ship of that corporation, providing a \$5 per month increase in pay and a \$50 bonus, and wages during intern-

ment, but the bonus was to be paid only if the ship should 'go into ports of Spain * * * until such time as the U. S. Maritime Commission cancels similar basis applicable to government operated ships which might call at Spanish ports.' On October 7, 1937, appellant was about to sail a vessel into the Mediterranean Sea, and its representative, Capt. Fiske, at New York, conferred with Howard McKenzie acting for the National Maritime Union, called his attention to the action of the Maritime Commission, and exhibited a copy of the contract between the Union and the Export Steamship Corporation, and asked if it was satisfactory to be used with the vessels of appellant, and he agreed. Fiske then dictated a contract which he thought was the same as the Export contract, but it used as to the bonus the words 'should call at Spanish ports' instead of 'going into ports of Spain.' The wording was identical otherwise. Fiske executed it for appellant and McKenzie for the Union. Without any further discussion exactly similar contracts were later executed for seven other vessels of appellant, including the two here involved. None of these vessels was intending to go to the Canary Islands and those Islands were not discussed or considered in framing any of the contracts. On March 11, 1938, one of appellant's ships was about to sail from Boston to Santa Cruz de Tenerife, and a contract in the above form was tendered the crew, but they refused to sign on unless a bonus was provided for. Fiske conferred with the Union, speaking with M. Byne, who seems to be the same who signed the original Export Steamship Corporation agreement, and they agreed that the bonus contract did not include Tenerife, and that the crew should sign on without a bonus for going there, and this was done. The contracts before us were signed about two months later, on June 5 and June 17, with no notice to Fiske of any change of view or contention on the part of the Union. But libellants proved by a representative of the Union at New Orleans that on March 22, 1938, a union contract was signed in Texas with the American-West African Line for one of its vessels, providing a bonus of \$50 if in the port of Tenerife, or 100 miles thereof, the ship should be attacked by airplane, armed trawler, or man of war. Fiske testifies without contradiction that the con-

tracts he made were understood to refer only to the Spanish ports in the danger zone pointed out by the Maritime Commission, and had no reference to remote islands or possessions of Spain.

"Since the American-West African contract was with another party and was altogether different in wording from those before us, and was not known to Fiske when these were made, nor considered in making them, it can throw no light on them. Yet the contracts in controversy do not stand independent and alone, but are mere repetitions as to these two ships of the original agreement made between appellant and the Union on October 7, 1937. The same form was used, with no further discussion of the terms. There is a direct reference in the contracts to the action of the Maritime Commission as to 'Spanish ports,' which shows the parties intended their contract to have the same substantial scope as the action of the Commission. The practical interpretation of the contract in the case of the ship sailing from Boston to the Canary Islands on March 11, 1938, is a powerful evidence that neither side thought the Islands included. Fiske's testimony to that effect is wholly uncontradicted.

"With the intent of the Union thus established, the seamen whom it represented cannot claim a different intent. The Union and not they signed these contracts. The Union was their representative, and the contracts mean what their representative and the opposite party understood them to mean.

"The judgment is set aside in each case and one will be entered dismissing the libel at libellants' cost."

It will be noted that, in the case cited, the term "Spanish ports" was termed fairly ambiguous in that it was not known whether the parties meant ports in Spain or ports belonging to Spain. In the *President Harrison* riders, the term "war zones" is fairly ambiguous or incomplete in that no war zones, as such, are defined in the riders. In the cited case, evidence of the genesis of the term in question was considered and was admitted showing that the provision was adopted from a Maritime Commission contract which provided for payment of the bonus only

in ports of Spain. In the present case, evidence of the genesis of the term "war zones" was introduced showing that the provision was adopted from the supplementary bonus agreements, which provided for payment of war bonus in war zones or areas specifically described in terms of voyages. In the cited case, the ambiguity was resolved by reference to the genesis of the contract, and the bonus was held not payable for calls at ports belonging to Spain. In the present case, the ambiguity or incompleteness of the riders was resolved by reference to the genesis of the contract, and it was held by the District Court that war bonus was not payable while crew members were on land and not aboard a vessel on a voyage prescribed as a war zone or area.

D. Shipping Articles Have No Greater Sanctity Than Other Contracts in Determining Contractual Intent.

The appellants endeavor to persuade this court, as they endeavored to persuade the District Court, that shipping articles possess a certain sanctity and immunity not found in other contracts which prohibit reference to extrinsic evidence to ascertain the contractual intent of the parties despite the fact that shipping articles or attached riders are incomplete and ambiguous. In its written decision, the District Court answered such arguments of the appellants as follows (566-568; 73 F.Supp. 948):

"In reality, however, the substance of libelants' argument is that the court is bound to blindfold its judicial eye to any relevant matters which might clear up a patent ambiguity to the seamen's disadvantage, merely because of the liberal doctrines which have been applied in dealings between shipowner and seamen for the latter's protection. But to deny a litigant the right to explain actual mutual intent in the use of ambiguous or uncertain terms, solely to preserve such ambiguity or uncertainty for the legal advantage to be thereby derived to his adversary, is beyond the bounds of all judicial liberality.

"Furthermore, such a theory violates the spirit of fairness which must dominate the practical application of abstract

legal concepts in a judicial system bent upon an impartial administration of law.

"Section 676 of Title 46 USCA does no more than reaffirm the familiar parol evidence rule that the plain terms of a contract may not be changed by recourse to extrinsic evidence. Certainly it does not vary the fundamental principle that ambiguity and uncertainty in language may be extrinsically clarified. True it is that the admiralty, in its jealous regard for the protection of the contractual rights of the lesser privileged seaman, requires shipping articles to make clear the essential terms of the contract of hire. Rules of admiralty law of this nature spring from the days when the seaman stood alone and when his need for legal protection in arriving at a fair contract of hire was very great. Consequently, in the national interest as well as in the seaman's own private interest, exceptional legal safeguards have protected the seaman against encroachment upon his human rights at the hands of the more favorably situated shipowning employer. However, the legal protection so established arose from and was based upon need. In good reason, the legal right thereto should be commensurate with and limited to such need. Today in the employer-employee relationship the position of the workman, and seaman as well, has become more fully equalized by force of his legally guaranteed right of collective bargaining.

"When the President Harrison articles were opened, supplementary bonus agreements, collectively arrived at, were effective. They were binding upon libelants as well as respondent and resulted from negotiations in which the seamen were adequately represented and their rights vigorously safeguarded. Their terms cannot be ignored or rejected, merely because of the possibility that they might, in a manner adverse to libelants, supply the explanation to uncertain language in the articles.

"Decision in this case might well rest upon an interpretation of the riders themselves to the effect that 'war zones' in the riders referred to and characterized only the designated areas as and when traversed by the President Harrison. But the court is of the view that justice requires consideration of the full picture of the contractual relations of

the parties. Consequently I hold that the supplementary bonus agreements are properly in evidence as part of the contract of hire governing the voyage of the President Harrison, to explain the uncertainties in the riders' terms."

Understandingly, counsel cite no authorities for the unsound proposition they advance. They refer to federal statutes (e.g., 46 U.S.C.A. 564) that provide for the execution of shipping articles and what shall be contained therein. With little more, they then arrive at the conclusion that the shipping articles and attached riders necessarily constitute the entire and only contract between the crew members and the shipowner and that even if ambiguity exists in the same, no resort may be made to extraneous sources for clarification. Such federal statutes define only the minimum terms and conditions to be contained in shipping articles. Not even an inference can be drawn from such statutes that crew members and their shipowning employers are restricted to the shipping articles in defining the contractual relationship between them. Most certainly, there is no judicial support for the contention that extrinsic evidence may not be considered to resolve an ambiguity in the shipping articles. On the other hand, there is recent legal precedent directly to the contrary in a case involving similar claim by seamen for war bonus during internment.

"And as in the interpretation of any other contract where there is ambiguity, extraneous evidence is admissible to aid in the construction of ships articles."

Mason v. Texas Co., 76 F.Supp. 318 at 321 (D.C. Mass. 1948).

Furthermore, we submit, it is a matter of such common knowledge that this court may take judicial notice of the fact that rights and obligations respecting the employment of crew members by vessel owners on the Pacific Coast are governed by the terms and conditions of collective bargaining agreements negotiated by their respective representatives as implied parts of their individual contracts of hire represented by the shipping articles, irrespective of ambiguity in the latter documents. As these words

are written, a settlement has just been reached of a prolonged maritime strike concerning the terms and conditions of collective bargaining agreements governing the employment, among others, of crew members by Pacific Coast shipowners. We know it would be a shock to all seafaring personnel returning to their jobs, as well as to their shipowning employers and the many other persons and business concerns affected by the strike, to hear it asserted that the newly consummated collective bargaining agreements are not valid, enforceable contracts and do not contractually govern, according to their terms, the conditions of employment of such employees. It is difficult to conceive of anything that could be more disruptive of the much needed and long sought stability in maritime labor relations than the establishment of such a principle. The various collective bargaining agreements in evidence in the present case demonstrate on their face that the parties intend such contracts to control terms of employment of the crew aboard vessels in conjunction with shipping articles.

In the case of *Clayton, et al., v. Standard Oil Co. of N. J.*, 42 F.Supp. 734, 1942 A.M.C. 61 (S.D. Tex.), the libelant crew members sought recovery of one-half of their wages, which was withheld by the respondent on the ground the libelants were deserters. The libelants contended the collective bargaining agreement between the National Maritime Union, of which they were members, and the respondent was a part of the shipping articles, and, since that agreement expired during the voyage from Boston to Galveston, they were justified in leaving the ship at the latter port. The court held in part as follows, at page 736:

"There is nothing in the shipping articles which refers to the agreement, but I think that, taking the record as a whole, it appears, and I find, that it is intended to make the agreement a part of the shipping articles."

In holding that the libelants had no lawful right to leave the vessel and were deserters, and in ruling that there was no provision in the collective bargaining agreement which permitted

the libelants to leave the vessel as they did, the court, at page 743, ruled as follows:

"The shipping articles between libelants and respondent and the agreement between the National Maritime Union and respondent, construed together, must be regarded as the contract between libelants and respondent."

We sincerely submit, as a matter of sound legal principle, that, whether there is ambiguity or uncertainty in shipping articles or not, the contractual relationship between crew members and shipowners and the terms and conditions of employment of the former by the latter are set forth in both the shipping articles and applicable collective bargaining agreements construed together. There is ample evidence in the record of this case to substantiate this proposition both as a sound legal principle and as an established practice.

By their own actions in this proceeding, the parties have acknowledged that collective bargaining agreements are not only implied parts of shipping articles, but are controlling in case of inconsistency. The monthly rates of pay set forth in the shipping articles (Ex. 1) under the title "Wages per Month" were not the basis upon which basic wages and emergency wage increases were paid to the appellants or other crew members, either for the period of employment aboard the vessel up to December 8, 1941, or for the period commencing with their internment on the latter date and ending with the return of the men to a continental United States port. Similarly, war bonus for the time the vessel was in the prescribed war zone prior to internment on December 8, 1941, was not computed or paid upon basic wages set forth in the basic wage agreements referred to in the two riders. The one exception to these statements is in the case of the unlicensed engineroom personnel inasmuch as the new basic agreement with the M.F.O.W.W. was executed on October 1, 1941, before the shipping articles were opened, and was the agreement specified in the rider for unlicensed personnel.

As shown by the undisputed testimony of Mr. Robert D.

Wade, vessel payroll auditor of the appellee, basic wages and emergency wage increases, except in respect to unlicensed engine-room personnel, were computed and paid at increased rates fixed by basic agreements negotiated and executed after the shipping articles were opened on October 15, 1941. War bonus payable up to December 8, 1941, was also computed at the increased basic wage rates fixed by the new basic agreements (520-525).

In its answers to the various libels, the appellee incorporated attached schedules showing the rates and amounts of basic wages, emergency wage increases, and war bonus (prior to December 8, 1941) paid to the appellants. Counsel for the appellants stipulated that these schedules were correct and accurately reflected the payments to the appellants (526-528). The "Wages per Month" shown on the shipping articles (Ex. 1) included basic wages and emergency wage increases (530-532). Comparison of these rates set forth in the shipping articles with the rates set forth in the aforementioned schedules also demonstrates that the wages and emergency wage increases prescribed by the new basic agreements and paid to the appellants were at higher rates than those specified in the shipping articles.

The obvious significance of this evidence is that the parties in this case followed without question the legal principle and the long-established practice of recognizing collective bargaining agreements as defining the contractual relationship between crew members and their shipowning employers. In fact, by making and accepting the payments of basic wages, emergency wages, and war bonuses at the higher rates prescribed in the collective bargaining agreements, the parties also recognized such agreements as being paramount and controlling where inconsistent with the riders.

Of similar significance is the fact that, in the case of the appellants who were licensed officers of the *President Harrison*, war bonus for the period prior to December 8, 1941, was computed, paid, and accepted at rates prescribed by the fourth series of supplementary bonus agreements with the M.M.&P. and the

M.E.B.A., which were higher than the rates specified in the licensed personnel rider. It will be noted in the licensed personnel rider that war bonus for licensed officers was computed at 60% of their basic wages set forth in the basic agreements specifically described in the rider. The supplementary bonus agreements with the M.M.&P. (Bryan's Ex. 49) and the M.E.B.A. (Bryan's Ex. 51) prescribed war bonus at the rate of $66\frac{2}{3}\%$ of basic wages. Mr. Wade testified the licensed officers were paid war bonus for the period up to December 8, 1941, at the increased rate of $66\frac{2}{3}\%$ instead of the 60% rate set forth in the licensed personnel rider (523). Furthermore, the $66\frac{2}{3}\%$ was computed on the increased basic wage fixed by the new basic agreements supplanting those prescribed in the rider.

At the time the shipping articles were opened on October 15, 1941, supplementary bonus agreements with the M.M.&P. and the M.E.B.A. had not been signed. Hence, the old and lower rates fixed by the August 16, 1941, agreement (Bryan's Ex. 33) were in effect and were the rates stated. The new supplementary bonus agreements with these unions, however, were retroactive to October 1, 1941, and were accepted and put into effect by the parties in accordance with law and practice as paramount to the shipping articles and attached riders.

The appellee does not contend that the acceptance of basic wages, emergency wages, and war bonus computed at these increased rates constitutes a waiver by appellants of their claim for war bonus during internment. Following the repatriation of the appellants and other crew members, a form of release (Ex. I) was agreed upon so as to permit the appellants and other crew members to receive the payments admittedly due them by appellee but still preserve their right to seek the recovery of war bonus during internment by judicial action such as here involved (Ex. I; Ex. 9; 553). Appellee does contend, however, that the making and accepting of these payments constitutes a practical and natural recognition by the parties in this case that collective bargaining agreements define the contractual relation-

ship of the parties together with the shipping articles and attached riders. Counsel for appellee did not stipulate that the releases aforementioned precluded the appellee from making this contention but in fact specifically reserved the right to assert the same (377-378).

E. The Supplementary Bonus Agreements and the Riders Attached to the Shipping Articles Were Part of the Same Transaction and Must Be Taken Together as a Matter of Construction.

The District Court found and concluded (595, 599) that:

"The shipping articles, with the riders attached thereto, and the supplementary bonus agreements were writings and contracts relating to the same matters and entered into by and in behalf of the same parties at substantially the same time and are parts of substantially one transaction. The shipping articles with the riders attached thereto and the supplementary bonus agreements must be taken as parts of the same or a single transaction."

The rule of construction embodied in the above-quoted finding and conclusion of the District Court and its application to the facts of this case furnishes another, independent reason and basis for the supplementary bonus agreements to be considered and construed together with the riders attached to the shipping articles. It is a well established rule of construction, as set forth in Sec. 1642 of the California Civil Code, that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

The United States Supreme Court has held that "several writings executed between the same parties substantially at the same time and relating to the same subject-matter may be read together as forming parts of one transaction, nor is it necessary that the instruments should in terms refer to each other." *Bailey v. Hannibal & St. J. R.R. Co.*, 17 Wall. 96, 84 U.S. 96, 21 L.Ed. 611.

The supplementary bonus agreements were executed with the S.U.P. and the M.F.O.W.W. on October 9, 1941, with the M.C.&S. on October 10, 1941, with the M.E.B.A. on October 15, 1941, and with the M.M.&P. on October 20, 1941. The shipping articles of the *President Harrison* with the riders attached were opened on October 15, 1941. Clearly, the supplementary bonus agreements and the shipping articles with the attached riders were executed at substantially the same time.

The supplementary bonus agreements were entered into by the unions in behalf of their respective members. The appellants were admittedly members of such respective unions and represented by them for collective bargaining purposes. These supplementary bonus agreements were entered into by the P.A.S.A. in behalf of its members, including the appellee (196-198; Bryan's Ex. 1 and 1A). The shipping articles with the attached riders were entered into by the appellants and by the Master of the vessel in behalf of the appellee (Ex. 1). It is equally clear, therefore, that the supplementary bonus agreements and the shipping articles with the riders attached were contracts between the same parties.

The riders and the supplementary bonus agreements obviously relate to the same subject matter, to wit, the payment of war bonus, including the rates thereof, the circumstances under which the same are payable and, particularly, the rights and obligations of the parties in the event the vessel be interned, destroyed, or abandoned as a result of war operations and unable to continue her voyage.

Under these indisputable circumstances, this well established rule of construction requires the supplementary bonus agreements and the riders to be taken and read together as parts of the same or a single transaction.

F. The Supplementary Bonus Agreements, as a Matter of Substantive Law, Prescribed Terms and Conditions That Were Implied Parts of the Shipping Articles and Could Not Be Varied by Individual Contracts of Hire.

The District Court found that the supplementary bonus agreements were collective bargaining agreements arrived at following negotiations between the collective bargaining representatives of the appellants and the appellee (591-592, 593). The District Court also found and concluded that the supplementary bonus agreements were implied parts of the shipping articles and the riders attached thereto and that any inconsistency between the two is controlled by the collective bargaining agreements (595, 599).

The United States Supreme Court has likened the collective bargaining agreement "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for services, which do not themselves establish any relationship, but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." *J. I. Case Co. v. N. L. R. B.*, 321 U.S. 332 at 335, 64 S.Ct. 576, 88 L.Ed. 762 at 766.

The relationship between a collective bargaining agreement and an individual contract of hire has been said to somewhat resemble "that between a group insurance policy and the individual insurance certificates issued under it." *Christiansen v. Local 680 of M. D. & D. Employees*, supra. "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings." *J. I. Case Co. v. N. L. R. B.*, supra, at U.S. 335, L.Ed. 766.

The following principle enunciated by the court in *Christiansen v. Local 680 of M. D. & D. Employees*, supra, has been frequently quoted and also appears in the annotation in 88 L.Ed. 770 at 773:

"The contract between employer and union not only enters into the individual contracts, but it circumscribes

the rights of the employer and the members of the union with respect to making individual contracts of employment."

The principle just mentioned was quoted with approval in *Dooley v. Lehigh Valley R. Co. of Pa.*, 130 N.J.Eq. 75, 21 A.(2d) 334. The opinion in the last cited case was adopted on appeal and affirmed in 131 N.J.Eq. 468, 25 A.(2d) 893, and the United States Supreme Court denied certiorari in 317 U.S. 649, 63 S.Ct. 45, 87 L.Ed. 523. The same principle was applied in the case of a collective bargaining agreement covering crew members of a vessel under shipping articles. *Clayton, et al., v. Standard Oil Co. of N. J.*, *supra*.

A collective bargaining agreement within the field in which it operates not only affects the individual employment contracts, but cannot be changed by the terms of the latter. Thus, the supplementary bonus agreements as collective bargaining agreements must not only be deemed an implied part of the shipping articles and the riders, but cannot be varied by the terms of the latter as individual contracts of hiring. In the case of *J. I. Case Co. v. N. L. R. B.*, *supra*, at U.S. 337, L.Ed. 767, the United States Supreme Court ruled in part as follows:

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not 'limit or condition the terms of the collective agreement.'"

In an annotation to this case, reference is made to 29 U.S.C. 159(a), and the following statement is made at 88 L.Ed. 770:

"Where representatives are designated or selected for the purposes of collective bargaining by the majority of employees, in an appropriate unit, an employer subject to the act is enjoined from entering into any contract concerning rules, rates of pay, and working conditions, except with such representatives."

See also:

Christiansen v. Local 680 of M. D. & D. Employees,
supra;

Steel v. Louisville & Nashville R.R. Co., 323 U.S. 192,
65 S.Ct. 226, 89 L.Ed. 172;

Medo Photo Supply Co. v. N. L. R. B., 321 U.S. 678,
64 S.Ct. 830, 88 L.Ed. 1007.

It may be conceded that nearly all of the cases which deal with the principle that individual contracts of hire may not vary the terms of a collective bargaining agreement are ones in which the prohibition against such changes is applied to the employer for the protection of the employee. The United States Supreme Court, however, has also considered this question from the point of view of the employee endeavoring to obtain terms in his individual contract of hire more favorable than those granted by the collective agreement. While not holding that such a variation is impossible or that there would never be circumstances under which such a result could be reached, the United States Supreme Court has, nevertheless, cast considerable doubt on the advisability of recognizing such a procedure in the absence of most unusual circumstances. In this connection, the court, in the case of *J. I. Case Co. v. N. L. R. B.*, supra, at U.S. 338, L.Ed. 768, stated:

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is a great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so pro-

vided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation. But the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We can not except individual contracts generally from the operation of collective ones because some may be more individually advantageous."

The factors involved in the present case justify the full application of the foregoing principle. Here, the supplementary bonus agreements clearly and fully operate in the field governed by the riders attached to the shipping articles. In fact, the supplementary bonus agreements cover the subject of war bonuses in greater detail and with more explicit provisions than do the riders. The war zones, in terms of voyages, are defined with particularity. The rates of war bonus are described in greater detail. In the supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S., port bonuses are prescribed for ports subject to regular bombing, although no mention of port bonuses is made in the riders. We doubt that the appellants or their counsel would disclaim the right of appellants to such port bonuses, if the *President Harrison* had called at any of these specified ports, upon the ground that the riders are the exclusive contract regulating the payment of war bonuses.

All of the supplementary bonus agreements contain machinery for adjusting war bonus to meet changing war conditions. These provisions demonstrate that such agreements did not merely prescribe minimum rates, but were the instruments by which

any future changes in rates would be fashioned. The supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. also contain provisions prohibiting lock-outs, strikes, slow-downs, or like action in connection with and on account of war bonus issues during the effective period of the agreements. These provisions show that such pressure methods of seeking variance from the terms of the collective agreements were not only not contemplated, but expressly renounced.

The development of events relating to war bonuses prior to the consummation of the fourth series of supplementary bonus agreements also conclusively proves that these agreements were intended by all parties concerned to settle by collective agreements, once and for all, during the period of the agreements, the disturbances, sailing delays, and varying demands that had produced such chaos theretofore in the shipping industry. The story of these events is clearly portrayed in the deposition of Mr. John B. Bryan (184-293).

This background furnishes the proper perspective with which the contractual relations of the parties should be viewed. With such perspective, the conclusion is inescapable that the fourth series of supplementary bonus agreements were considered by all parties concerned as binding and final contracts on the subject of war bonuses. Bearing in mind that the supplementary bonus agreements were consummated only a few days prior to October 15, 1941, when the shipping articles were opened, or were in the process of negotiation with the licensed personnel unions at that time, one must conclude that all parties considered these agreements to prescribe conclusively the terms and conditions under which war bonuses were payable to crew members. It is unreasonable to believe that the riders attached to the shipping articles of the *President Harrison* were intended to vary from the provisions of collective bargaining agreements entered into only five or six days previously and which formed the pattern for the similar collective bargaining agreements covering licensed personnel then in the process of negotiation.

It must be concluded that the riders were intended only to carry out the terms and provisions of the supplementary bonus agreements.

We do not concede for a moment that the internment provision contained in the riders varies from that contained in the fourth series of supplementary bonus agreements. The riders, with less detail and particularity than the supplementary bonus agreements, attempted to reaffirm the internment provision contained in the collective bargaining agreements. The fact that less detail and particularity was used in the riders does not manifest a variance. It shows only an incompleteness. Should, however, it be deemed that a variance exists, we then emphatically contend, first, that, under all of the circumstances attending the transaction which this court is entitled to consider, no variance was intended, and, secondly, that, if there was a variance intended or otherwise, the same was prohibited by the collective bargaining agreements, which circumscribed the rights and responsibilities of the appellees and appellants with respect to making individual contracts of employment covering the same subject matter different in terms from those prescribed by the collective bargaining agreements.

G. It Is Clear That the Supplementary Bonus Agreements Do Not Provide for the Payment of War Bonus During Internment.

In view of the conclusion already reached by this court in *The Capillo* case that the supplementary bonus agreements do not provide for war bonus during internment of crew members on land, it is unnecessary to do more than outline the various provisions of the agreements that point to this conclusion. The supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. at the outset indicate that war bonuses are payable only to crew members while aboard vessels in the war zones. The first "Whereas" clause contained in the preamble of these agreements reads as follows:

"Whereas, the parties hereto are engaged in the negotiation of a collective bargaining contract relative to wages,

hours, and working conditions for members of the Union and desire to provide a collateral or supplementary agreement for bonuses payable to members of the Union *on vessels going into war zones; and*"

The last sentence of the internment provision in the supplementary bonus agreements uses the term "war zones" or "war areas." It is only while crew members are in those war zones or war areas that war bonuses are payable. We have already demonstrated how each agreement defines war risk zones or areas in terms of voyages and that, in respect to the trans-Pacific voyage here involved, the zone or area was further restricted to include only that portion of the voyage after crossing the 180th meridian westbound and until recrossing the same meridian eastbound.

This conclusion is further supported by a study of the description of other war risk zones contained in the agreements covering unlicensed personnel (Bryan's Ex. 47, 48 and 50). Reference is made in Zones I and II to "whole voyages" with an exception in Zone I if the vessel continues eastbound. Further, in Zone IV, war bonus on trans-Pacific voyages to New Zealand or Australia are, in some circumstances, made dependent upon the arrival or departure of the vessel at or from Suva. In Zone V, further reference is made to conditions relating solely to the vessel before bonus becomes payable.

Had the internment of the vessel and the crew in this case occurred while the vessel was on a voyage in War Risk Zone II, there would have been no reference to the crossing or recrossing of any meridian. War Risk Zone II is described as follows:

"Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)"

Clearly, under these assumed circumstances, war bonus would be payable only while the original vessel or a vessel repatriating the crew was on such a voyage. It could not be contended that any meridian formed the boundary of any geographical area which constituted a war zone. Internment of the crew members,

for instance, in Germany certainly would not fall within a zone defined as a whole trans-Atlantic voyage to Russia.

The intent of the parties to relate the payment of war bonus directly to the voyage or position of a vessel is further manifested by the provisions dealing with port bonuses contained in the supplementary bonus agreements with the S.U.P., M.F.O.W.W., and M.C.&S. For instance, in addition to the \$100 paid for calling at the Port of Suez, or any other port subject to regular bombings, an extra \$5.00 was provided "for each day beyond five days that the vessel was in that port." In all of the supplementary bonus agreements, the provision requiring the maintenance of war risk insurance in the sum of \$5,000 is related to voyages either "provided for in this agreement" or "described in the above danger areas."

In respect to the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. (Bryan's Ex. 49 and 51), the machinery provided therein for the adjustment of war bonus rates, dependent upon future events, is geared to "war risk insurance rates paid on hulls of American flag vessels operating in all areas above described." This, of course, is a clear indication that war bonuses were payable only in relation to a vessel operating on a voyage described as a war risk area.

H. It Is Equally Clear That the Supplementary Bonus Agreements and the Riders, Taken Together, Do Not Provide for the Payment of War Bonus During Internment.

When the supplementary bonus agreements and the riders are taken together, there can be no doubt that the parties intended reference in all cases to the war zones defined with particularity in the supplementary bonus agreements.

The last sentence of the internment provision of the unlicensed riders reads:

"War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

The corresponding sentence contained in the supplementary bonus agreements covering unlicensed personnel reads as follows:

"War bonuses at the rate specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein."

The last sentence of the internment provision in the licensed personnel rider reads as follows:

"War bonuses at the rate specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein."

A similar sentence contained in the supplementary bonus agreements with the M.M.&P. and the M.E.B.A. reads as follows:

"While employees are in the war zones or areas described herein war bonuses shall also be paid to them at the rate of $66\frac{2}{3}\%$ of the said basic wages in Areas I to V, inclusive, and 25% in Area VI."

Appellants contend that paragraph 3 of the licensed personnel rider and paragraph 5 of the unlicensed personnel rider, reading as follows, define the war zones:

"This emergency wage increase [i.e., war bonus] to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound."

As we have previously shown, the last quoted provision is not a *definition* of a war risk zone or area. It is, instead, a qualification or limitation imposed on war risk zones or areas specifically described in the supplementary bonus agreements in terms of voyages.

To adopt the last quoted provision of the rider as a complete and full definition of war zones is to ignore the *specific* definition of such war zones or areas in the terms of voyages in the supplementary bonus agreements. On the other hand, in construing the supplementary bonus agreements and the riders together, the adoption of the specifically defined war risk zones

or areas in the former agreements gives effect to the general purposes of the contract and reconciles and gives meaning to the reference to the 180th meridian in both the riders and the supplementary bonus agreements. The axiom referred to by this court in *The Capillo* decision may be invoked here to give effect to the *specific* contractual language contained in the definitions of war risk zones or areas contained in the supplementary bonus agreements. This construction not only gives a reasonable meaning to all provisions of the contract, but also gives effect to the main apparent purpose.

In *Williston on Contracts*, Revised Edition, the following is stated:

"Sec. 619. The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if that is impossible an interpretation which gives effect to the main apparent purpose of the contract will be favored. Indeed, in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied, or transported."

* * * * *

"Sec. 624. It was early laid down, that, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. The same doctrine has been held in some modern cases applicable to contracts generally.

* * * The *true rule* seems to be as stated in a Maine decision.

* * * * *

" 'When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause.' "

Union Water Co. v. Lewiston, 101 Me. 564, 65 A. 67.

"Where a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded."

12 *Am. Jur.* 779.

"* * * Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed, as not to conflict with the main purpose * * *"

Marx v. American Malting Co., 169 F. 582, 584 (6 C.C.A.).

This court, in *The Capillo* decision, has construed the applicable war zone defined in the supplementary bonus agreements as consisting of "a voyage westerly from and easterly to the 180th meridian." When these agreements are taken with the riders as constituting the contract between the parties, the same construction must be given the term "war zones" used in the riders.

"It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another."

Pringle v. Wilson, 156 Cal. 313, 104 Pac. 316.

"Words used in a certain sense in one part of a contract will be deemed to have been used in the same sense in another part, unless the context indicates otherwise."

Jensen v. Franklin, 74 F.(2d) 501 (10 C.C.A.).

"It is an inveterate rule in the construction of a written instrument that ordinarily the same word occurring more

than once is to be given the same meaning, unless the context indicates that it was used in a different sense.”

Midland Valley R. Co. v. Railway Express Agency, 105 F.(2d) 201 (10 C.C.A.).

As previously stated, the construction of the supplementary bonus agreements and the riders adopted by the District Court gives effect to the general purpose of the contract, does not render meaningless any specific term, but, on the contrary, gives meaning to and reconciles the paragraph in the riders referring to the 180th meridian, and consistently ascribes to the use of the term “war zones” in the riders the same sense in which this term is used in the balance of the contract, i.e., in the supplementary bonus agreements. The interpretation urged by the appellants, on the other hand, does violence to and conflicts with all these accepted rules of construction. In fact, the interpretation contended for by the appellants leads to an absurdity when applied to the case of crew members who, like the appellant Clara Main, never crossed the 180th meridian eastbound in her repatriation (539-540).

There are many additional rules of construction and maxims of jurisprudence which support the interpretation adopted by the District Court. We believe that the mere mention of these additional rules of construction and maxims of jurisprudence, without discussion, is sufficient to demonstrate their applicability to the circumstances of this case. The same are set forth in Appendix E attached hereto.

I. Reference to Other Extrinsic Evidence Overwhelmingly Proves the Parties Did Not Intend to Provide, and Did Not Provide, for the Payment of War Bonus During Internment.

We agree wholeheartedly with the ruling by this court in *The Capillo* decision that no testimony or extrinsic evidence is required to make it clear that the supplementary bonus agreements did not provide for the payment of war bonus during

internment. We also believe that we have adequately demonstrated the soundness of the District Court's conclusion that the supplementary bonus agreements and the riders attached to the shipping articles must be considered together in determining the contractual intent of the parties and that, when so considered together, the interpretation is inescapable that no provision was made for the payment of war bonus during internment. While we also believe this construction follows from merely considering the supplementary bonus agreements with the riders, it was also proper for the District Court to consider other material, extrinsic evidence in seeking clarification of the incompleteness and ambiguity contained in the riders.

The rules of evidence in admiralty courts are more liberal than those in common law courts. This has been explained in *Benedict on Admiralty*, 6th Edition, Volume 3, page 5, section 381(b) as follows:

"Admiralty cases are tried by a single judge, without the aid of a jury. Hence the elaborate rules of evidence deemed necessary to protect the untrained jury are not required. Courts of admiralty are not bound by all the rules of evidence which are applied in courts of common law and they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other courts. The experienced judge may be relied upon to appreciate the probative value of any material offered in evidence; and if he should err, the appellate court may correct the error, as an admiralty appeal is a trial de novo.

"The freedom in admitting evidence is largely due to the fact admiralty cases are tried by judges, and not by juries. Thus evidence may be admitted to explain an ambiguous contract * * *"

See also:

The Vivid, 4 Ben. 419, 28 Fed. Cas. 1234, Fed. Case No. 16978 (E.D. N.Y.).

Admiralty courts are not bound by the common law rules of evidence.

Downs v. Wall, 176 Fed. 657, 659 (5 C.C.A.);
Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co., 40 F.Supp. 378 (W.D. N.Y.),
 Affirmed 129 F.(2d) 319 (2 C.C.A.);
The Denny, 127 F.(2d) 404 (3 C.C.A.).

An admiralty court, having to determine a controversy over a maritime contract, ambiguous in terms, is not bound within the narrow limits of a court of law. Evidence ordinarily inadmissible in a case of law might be admitted upon equitable principles in a court of admiralty, to explain an ambiguity in a maritime contract.

Mexican Petroleum Corp. of Louisiana v. North German Lloyd, 17 F.(2d) 113, (E.D. La.).

Evidence of the following types offered by the appellee and received by the District Court in this case, has been admitted by admiralty courts to aid in the interpretation of an ambiguous contract:

1. Conduct of the parties under the contract in question. (*Mexican Petroleum Corp. of La. v. North German Lloyd*, supra; *Vital v. Kerr*, 297 F. 959, 968-9 (2 C.C.A.) (Cert. den.) *Bigio v. Kerr*, 265 U.S. 592, 44 S.Ct. 637, 68 L.Ed. 1196.)
2. Previous dealings between the parties. (*Reed v. Merchant's Mutual Ins. Co.*, 95 U.S. 23, 24 L.Ed. 348; *Mexican Petroleum Corp. of La. v. North German Lloyd*, supra.)
3. Negotiations preceding the contract. (*Mexican Petroleum Corp. of La. v. North German Lloyd*, supra.)
4. Circumstances surrounding the making of the contract. (*Reed v. Merchant's Mutual Ins. Co.*, supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.*, 13 Pet. 89, 38 U.S. 89, 10 L.Ed. 72; *Columbia, Wilson v. W. R. Grace & Company*, 4 F.(2d) 673, 675, 1925 A.M.C. 664, 667 (9 C.C.A.).)

Evidence of the type mentioned above has been admitted for the following purposes for which the aforementioned extrinsic evidence was introduced by the appellee and received by the District Court in this case:

1. The situation of the parties. (*Reed v. Merchant's Mutual Ins. Co.*, supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.*, supra.)

2. The subject matter of the contract. (*Reed v. Merchant's Mutual Ins. Co.*, supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.*, supra; *Newport News Shipbuilding & Dry Dock Co. v. U. S.*, 34 F. (2d) 100 (4 C.C.A.), (Cert. den.: 280 U.S. 599, 50 S.Ct. 69, 74 L.Ed. 645.)

3. The meaning of trade or technical terms. (*Bradley v. The Washington, Alexandria & Georgetown Packet Co.*, supra; *Newport News Shipbuilding & Dry Dock Co. v. U. S.*, supra.)

4. The intention of the parties. (*Reed v. Merchant's Mutual Ins. Co.*, supra; *Bradley v. The Washington, Alexandria & Georgetown Packet Co.*, supra.)

We believe that abundant reasons have already been shown why the supplementary bonus agreements and the riders must be taken together and why it must be concluded in construing these documents together that the parties did not contract for the payment of war bonus during internment. Although admissible and proper, particularly in view of the incompleteness and ambiguity contained in the riders, additional extrinsic evidence is probably unnecessary to substantiate this result. However, consideration of this additional extrinsic evidence overwhelmingly proves the contractual intent of the parties adopted by the District Court. Most of this additional extrinsic evidence is contained in the deposition of John B. Bryan (184-293), which was received in evidence (598). We shall attempt only to summarize the same here. A brief resume of this evidence was also given during the trial (449-456).

Mr. Bryan testified that, during all of the negotiations that preceded the first, second, and third series of supplementary bonus agreements, no demand was made by the unions for bonuses to the crew members in the event of internment of a vessel until the negotiations that preceded the third series of such agreements (220). At that time, the S.U.P. asked that wages be paid in the event of such internment, but this request was refused by the P.A.S.A. (220-225; Bryan's Ex. 28 and 29). In the negotiations with the M.M.&P. and M.E.B.A. preceding the nationwide, uniform agreement with these unions dated August 16, 1941, the two unions jointly demanded the payment of wages and emergency wage increases to their members until return to a continental United States port in the event of internment, destruction, or abandonment of the vessel due to war causes. They also demanded the employers agree to repatriate the licensed officers to a continental United States port and to pay them a war bonus in such connection while in the war zones. A photostatic copy of these written demands, bearing Mr. Bryan's own penciled notations made during the negotiations, was introduced in evidence (Bryan's Ex. 33). A comparison between this document and the actual agreement of August 16, 1941 (Bryan's Ex. 34) shows that all of these demands were granted except that for bonus during repatriation (242-244).

As an incident to demands for increased bonus rates, the S.U.P., thirty days later, wrote the P.A.S.A. a letter on September 16, 1941, and, among other things, demanded that "pay" continue in the event of internment of crew members (Bryan's Ex. 35 and 36). This same demand was made by the S.U.P. later that same month in a hearing before the National Defense Mediation Board (Bryan's Ex. 40). The decision of this board (Bryan's Ex. 42) on October 4, 1941, was the basis of the fourth series of supplementary bonus agreements entered into with the S.U.P., M.F.O.W.W., and M.C.&S. on October 9 and 10, 1941. A comparison between this decision and these agree-

ments will show that the recommendations contained in the decision were adopted almost verbatim in the agreements (255).

The decision, however, covered only war bonus rates, war zones where payable, and machinery for future adjustments. As shown by clause 10 thereof, other subjects were left for disposition by collective bargaining. The S.U.P. was the only Pacific Coast maritime labor union involved in the dispute before the National Defense Mediation Board (252), and the first supplementary bonus agreement was negotiated with that union on October 9, 1941 (255-256).

Thus, up to October 9, 1941, there was not even a request by the unions for bonus to be paid during internment. The M.M.&P. and M.E.B.A. had requested war bonus to be paid during repatriation while licensed officers were in war zones, but this was declined. In negotiating and drafting the first supplementary bonus agreement of the fourth series with the S.U.P., it is obvious that the internment provision contained in the August 16, 1941, agreement with the M.M.&P. and M.E.B.A. (Bryan's Ex. 34) was used as a pattern. The language is almost word for word the same. But the employers at this time conceded the payment of war bonus during repatriation while in the war zones. This was done because it was pointed out that the exposure to war risks while employed aboard a vessel on a voyage for which war bonus was paid, existed as much while the men were being repatriated on other vessels engaged on similar voyages (243-244, 257). The P.A.S.A. granted at this time (October 9, 1941) what the M.M.&P. and M.E.B.A. requested in August, 1941 (Bryan's Ex. 32).

In drafting the repatriation clause and the agreement to pay war bonus during repatriation, a punctuational change was made. The obligation to repatriate the men was set forth in the second sentence in the internment provision contained in the August 16, 1941, agreement (Bryan's Ex. 34, p. 4). The requirement that war bonus be paid during repatriation in the demands of the M.M.&P. and M.E.B.A. was in the form of a

clause added to this second sentence (Bryan's Ex. 33, p. 4). In drafting the internment provision contained in the October 9, 1941, supplementary bonus agreement with the S.U.P., the obligation to repatriate was added as a clause to the first sentence of the internment provision, and the requirement that war bonus be paid during repatriation was set forth in a second sentence (Bryan's Ex. 47, p. 5). The internment provisions contained in the supplementary bonus agreements that followed the October 9, 1941, agreement with the S.U.P. were drafted in the same fashion. The same treatment is found in the internment provision contained in the *S.S. President Harrison* riders.

We frankly assert to the court that, in our sincere opinion, this whole law suit is a result of this change in punctuation. Had the obligation to repatriate and the obligation to pay war bonus been kept together in a second sentence, the relationship between the two would have been unmistakably conclusive. It would have been so palpable that the riders as well as the supplementary bonus agreements provided for the payment of war bonus only during repatriation that no one would have conjured up the claim for war bonus during internment.

We think that the ambiguity in the riders is readily resolved by resort to the supplementary bonus agreements, which also must be treated as effective agreements binding upon the parties. But if even the slightest question remains, we are confident that the foregoing extrinsic evidence removes all shadow of doubt.

No better application could be made of one of our fundamental principles of jurisprudence that the law is more concerned with substance than with form. Thus, a non-significant change in punctuation is not permitted to defeat the intent of the parties.

Other extrinsic evidence consisted of various shipping articles with riders attached used by various shipowning members of the P.A.S.A. in respect to vessels sailing from the Port of San Francisco during 1941. We offer no reconciliation of the variance in practices among members of the P.A.S.A. in the use of

riders, especially prior to October 9, 1941. The only explanation is found in the testimony of Mr. Bryan that conditions in respect to war bonuses during this period were chaotic (211-212, 214-215, 217-218, 225-227, 238-239, 271-277; Bryan's Ex. 30, 31, 38, 39, and 41).

This confusion and chaos related to rates of war bonus and in what areas the same was payable. Provisions as to internment of the crew were of incidental importance in the minds of the parties involved. While it was contemplated at that time that American vessels might be destroyed or interned because they carried contrabands of war, since this country was not then at war, there were no instances of our crews being interned, and only the repatriation of the crew in the event of destruction or internment of the vessel was the immediate problem in this connection (239, 243-244). *Mason v. Texas Co.*, supra at 322.

Some stabilizing effect came with the uniform agreement of August 16, 1941, covering licensed officers (Bryan's Ex. 34), the decision of the National Defense Mediation Board (Bryan's Ex. 42), and, finally, with the fourth series of supplementary bonus agreements executed in October of 1941. While the various shipowning members of the P.A.S.A. continued the routine practice of using riders attached to shipping articles even after the fourth series of supplementary bonus agreements, significant changes were made in the forms of these riders. We respectfully request the court to compare the form of riders used by Matson Navigation Company and Oceanic Steamship Company (included in Ex. H) before the fourth series of supplementary bonus agreements (Appendix E) with the form of riders used by these companies on their vessels following the consummation of these agreements (Appendix F). We have already requested a similar comparison between the form of riders used by the appellee before October 9, 1941, when the first supplementary bonus agreements of the fourth series were entered into (Appendix C), and the form used thereafter (Appendix D). The changes made by the appellee, Matson and

Oceanic in their respective forms of riders after October 9, 1941, were extremely significant. They conformed the internment provision to the newly negotiated supplementary bonus agreements and added a provision for the payment of war bonus during repatriation while in the war zones.

The stabilizing influence brought about by the fourth series of supplementary bonus agreements on war bonus questions carried over beyond the time that the *President Harrison* sailed and for a month or so thereafter. However, at the time of Pearl Harbor, new bonus demands were in the making, and, shortly after this country entered the war, the Maritime War Emergency Board was created to furnish the stability and nationwide uniformity respecting war bonus that all interested parties agreed was desirable and necessary.

J. The Effect of the Decisions of the Maritime War Emergency Board.

In *The Capillo* decision, this court rejected the contention that decisions of the Maritime War Emergency Board (M.W.E.B.) were applicable and defined the rights and obligations of the parties involved in respect to war bonuses. In its decision this court assigned four reasons for refusing to apply the decisions of the M.W.E.B. (154 F.(2d) 24 at 26). The District Court, in the present case, also ruled that the decisions of the M.W.E.B. had no application chiefly for the reason that there was no showing the appellants had specifically authorized their respective unions to submit the question of the interpretation of their private contracts with shipowners to the M.W.E.B. for decision.

Since *The Capillo* decision and the decision by the District Court in the present case, there have been two other decisions by federal courts which passed on the effectiveness and applicability of decisions of the M.W.E.B. in respect to claims for war bonus during internment: *Mason v. Texas Co.*, supra, and *Montoya v. Tidewater Associated Oil Co.*, 79 F. Supp. 677

(S.D. N.Y.—1948). In both of these decisions, it was held that appropriate decisions of the M.W.E.B. were applicable and effective and that the same did not provide for the payment of war bonus during internment. It is true that in both these cases the shipping articles were opened and the voyages of the vessels were commenced after the announcement of the appropriate decision of the M.W.E.B. and that riders attached to the shipping articles were held to incorporate the decisions of the M.W.E.B. It is admitted, therefore, that there are additional reasons in these two cases for the decisions of the M.W.E.B. to be held applicable and controlling to those in the present case or in *The Capillo* case.

The appellee feels, nevertheless, that the record in these consolidated appeals presents additional evidence to that which was before this court in *The Capillo* case (76, 87-92, 96-99; Nielsen's Ex. 17) and that adequate answers are provided to three of the grounds upon which the rejection of the decisions of the Maritime War Emergency Board was based by this court in *The Capillo* case. The appellee concedes there is no evidence contained in the record in the present case concerning specific authorization by the appellants to their respective unions to join in the creation of the M.W.E.B. and to grant it the powers exercised by the Board other than evidence of their membership in such unions and the authorization that may be implied thereby and by the further fact that such unions represented appellants for collective bargaining purposes. We submit that the agreement creating and empowering the M.W.E.B., called "The Statement of Principles" (Nielsen's Ex. 1), entered into by various maritime labor unions, including those in which appellants held membership, and shipowning employers and their representatives is a type of agreement that fairly may be deemed a collective bargaining agreement (65-71). Authority to bind appellants by such agreement is as much implied by their membership in these unions as is similar authority implied by the membership of other union members whose war bonus

rights were fixed by decisions of the M.W.E.B. commencing December 7, 1941, even though they were on a voyage under shipping articles opened before that date (87-90).

To set forth our contentions fully concerning the applicability of the decisions of the M.W.E.B., particularly Decision No. 5, Revised (Nielsen's Ex. 8), would require discussion disproportionate to the importance of this proposition. Accordingly, we shall attempt only to summarize our arguments regarding the applicability of the M.W.E.B. decisions to this case:

1. The riders and supplementary bonus agreements governed the rights and obligations of the parties in respect to benefits payable to appellants because of their internment up to February 21, 1942. Decision No. 5, Revised, by its express terms, was not retroactive in the case of the *President Harrison* in these respects because of the existence of these contracts. This decision of the M.W.E.B., however, superseded the riders and supplementary bonus agreements as of February 21, 1942, and the rights and obligations of the parties thereafter were controlled by this decision in respect to benefits payable because of internment. The riders, supplementary bonus agreements, and Decision No. 5, Revised, all required the payment of basic wages and emergency wages to interned crew members until their return to a continental United States port. However, since the appellants have been paid such benefits by the appellee, the nature or origin of this obligation, already discharged by the appellee, is of no materiality.

2. On and after February 21, 1942, Decision No. 5, Revised, particularly Article 6 thereof, governed the rights and obligations of the parties as to whether war bonus was payable to the appellants during internment. This is so because this decision as of that date superseded and supplanted any existing contractual provisions governing this subject in shipping articles and collective bargaining agreements. This result, however, is of no consequence if this court agrees with the District Court and the appellee's contentions that the riders and supplementary bonus agreements do not provide for the payment of war bonus

to the appellants during internment. If, however, this court determines that the riders and supplementary bonus agreements do impose this obligation upon the appellee, then such obligation was terminated by Decision No. 5, Revised, on February 21, 1942, because that superseding decision clearly provides that war bonus is not payable to crew members during internment (Article 6).

3. The riders, supplementary bonus agreements, and Decision No. 5, Revised, all require that war bonus be paid to interned crew members following their liberation and during their repatriation to a continental United States port. However, Decision No. 2 (Nielsen's Ex. 3) and subsequent decisions covering the same subjects (Nielsen's Ex. 4, 5, 6, 7, 9, and 10) supplanted and superseded contractual arrangements contained in shipping articles or collective bargaining agreements governing the rates of war bonus and where payable on or after December 7, 1941. At the time appellants were repatriated, Decision No. 2-C (Nielsen's Ex. 9) was in effect until October 1, 1945, and Decision No. 2-D (Nielsen's Ex. 10) was in effect thereafter. Therefore, war bonus payable to appellants during repatriation, both as to rates and areas where payable, was governed by these two decisions of the M.W.E.B. Appellee tendered and computed war bonus in accordance with these decisions for the period of repatriation, but payment was refused by appellants. The appellee concedes, as it has from the inception, that appellants are entitled to a decree for war bonus during a portion of their repatriation voyage. The District Court held that war bonus during repatriation of appellants should be computed at the rates and in the manner prescribed by the riders and supplementary bonus agreements. The appellee did not appeal from this portion of the Final Decree of the District Court and concedes that this portion of the Decree must stand even if this court agrees with appellee that Decision No. 5, Revised, governs the rights and obligations of the parties in respect to appellants' internment on and after February 21, 1942, and that the decision does not provide for war bonus during that period.

IV.

**THERE IS NO MERIT IN THE CLAIM FOR
MAINTENANCE DURING INTERNMENT**

The finding of the District Court (597-598) in respect to the claim for maintenance is as follows:

"Except for the obligation of the respondent contained in the articles and riders attached thereto and the aforementioned supplementary bonus agreements to pay wages during internment and until repatriation to a continental United States port and to pay war bonus during the period of a repatriation voyage until crossing the 180th meridian eastbound, the shipping articles, including the riders attached, were terminated and frustrated by the cessation and frustration of the voyage which occurred when the S.S. President Harrison was grounded and captured by the Japanese on December 8, 1941. Any obligation of the respondent to pay maintenance that might be implicit in its agreement to pay wages to crew members, no longer existed or had any application after the cessation and frustration of the voyage on December 8, 1941. There was neither an express nor an implied contract between the parties providing for the payment of maintenance to the libelants after the cessation or frustration of the voyage or after the termination or frustration of the shipping articles, including the attached riders, or during the period of internment of the libelants."

The District Court also concluded, as a matter of law (598-599), as follows:

"The respondent is not liable to the libelants, or any of them, for the payment or furnishing of maintenance during their internment or for any period of time subsequent to December 8, 1941."

Appellants' claim for maintenance during their internment has all the appearance of an afterthought. The theory of the claim, as expressed in the libels, is vague, and, in their briefs, appellants are still not certain. They assert in both briefs that there is an implied obligation to pay maintenance as a corollary

to the agreement to pay wages during internment. In the Federer case (No. 11,946), counsel state that an inept provision in a collective bargaining agreement contains an express obligation to pay maintenance during internment although, in the discussion of the claim for war bonus, it is argued that the shipping articles with the attached riders are the exclusive contract governing the parties.

The two theories of recovery asserted by counsel in the Federer case are inconsistent. One is based on implied contract; the other on express contract. There can't be both. If there is an express agreement, there can't be an implied one.

12 *Am. Jur.* 505, Par. 7;

Phelps v. Sheldon, 13 Pick. 50 (Mass.), 23 Am. Dec. 659;

Hawkins v. United States, 96 U.S. 689, 24 L.Ed. 607.

Since counsel in the Agnew and Griffin cases (Nos. 11,943 and 11,944) don't advance the express contract theory, although the S.U.P., M.F.O.W.W., M.M.&P., and M.E.B.A. basic agreements contained a similar provision, and since counsel in the Federer case really only suggest their might be such a theory, it is, perhaps, in order to dispose of this first.

Counsel in the Federer case quote a provision contained in the basic agreement with the M.C.&S. of July 5, 1940 (Ex. 6A). In the first place, this basic agreement was superseded by a new basic agreement with the M.C.&S. dated October 31, 1941, and effective October 1, 1941 (Bryan's Ex. 57). The same provision, however, was in the latter agreement (see page 23 thereof).

As counsel concede (Brief, p. 22), no party to the agreement ever intended the provision to apply to a case of internment. Similar provisions have been in basic agreements between the P.A.S.A. and these various unions since 1937, long before war conditions were contemplated (204). No dispute has ever arisen and no claim was ever made relating to the application of these provisions to internment of crew members (208-209), although similar agreements with the same provisions were in effect dur-

ing the war and while the merchant marine was operated by the War Shipping Administration (Bryan's Ex. 8, 9, and 10; 204-207), and although, as the court can judicially notice, hundreds of our merchant seamen were interned during the war. Thus, as a matter of practical construction by the parties, no one until now has even attempted to apply the provision to a situation of internment during war.

The comparable provision in the applicable basic agreement with the S.U.P. dated November 4, 1941, and effective October 1, 1941 (Bryan's Ex. 55), reads as follows at page 22:

"Section 6. When board is not furnished the crew shall receive 75 cents for dinner and 75 cents for supper and when compelled to sleep on shore on account of repairing, cleaning or fumigating the sleeping quarters, they shall receive one dollar and fifty cents (\$1.50) per night for rent."

Similar provisions are in other applicable basic agreements (Bryan's Ex. 56 and Ex. 5, at page 9; Bryan's Ex. 58, at page 11; Bryan's Ex. 6 and 59, at page 15 of the former; Bryan's Ex. 60 at page 5).

It is obvious that all of these provisions were designed, intended, and construed by the parties to apply only to a situation where the voyage was in progress and not frustrated; where the crew members continued in the service of the ship and in the employ of the shipowner; and where there was only a temporary interruption in the furnishing of meals and sleeping quarters aboard the vessel and not a permanent impossibility of doing so.

With respect to the contention that there was an implied obligation to furnish maintenance, it should be noted at the outset that, at least, counsel in the Federer case (Brief, p. 19) concede the law to be that when a voyage is frustrated or abandoned, as where a vessel is captured or interned, the shipping articles are dissolved and no further obligation to the seamen from the shipowner exists.

See:

U.S.C., Title 46, Sec. 593;
The Saratoga, Fed. Cas. No. 12,355;
The Edna, 291 F. 379 (N.D. Cal.);
The Edna, 292 F. 640 (N.D. Cal.);
Alaska S.S. Co. v. United States, 290 U.S. 256, 54 S.Ct.
 159, 78 L.Ed. 302;
American Mail Line v. United States, 59 F.Supp. 921;
Horlock v. Beal (1916), A.C. 486.

It is clear, therefore, that without the riders attached to the shipping articles or the supplementary bonus agreements or Decision No. 5, Revised, of the M.W.E.B., no further obligations were owed the appellants by the appellee following the internment of the *President Harrison*. It is at this point, however, that all counsel for the appellants leave firm ground.

Counsel argue that appellee's obligation to pay wages until the crew were returned to a continental United States port under the riders (and, we add, the supplementary bonus agreements and Decision No. 5, Revised, of the M.W.E.B.), in the event of the vessel's internment, created an implied corollary obligation to furnish maintenance or subsistence for the same period. As authority for this unique proposition, counsel cite various decisions holding that, as an incident to the hiring or employment of seamen, there is an implied obligation on the part of the shipowner to furnish food and lodging. They then assert the judicially unsupported proposition that as long as the shipowner is under contract to pay wages an implied obligation exists on his part to furnish maintenance.

All of the cases cited by counsel, as conceded in the Federer brief (p. 21), involve situations where the ship was in commission; the voyage was actually in progress or, at least, had not been terminated or frustrated; the shipping articles had not been frustrated or dissolved; the seamen were still in the service of the ship; the employer-employee relationship still existed in

fact and in theory; wages were payable for services rendered; and neither the ship nor crew had been interned so as to render all obligations impossible of performance.

There can be no doubt that the capture and internment of the *President Harrison* and the appellants terminated their service.

"The services of libelants terminated on January 27, 1916, by reason of the loss of the vessel to her owners, due to her capture by the British as a prize. Libelants thereafter performed no service * * *"

The Edna, 291 F. 379 at 380 (N.D. Cal.).

The obligation of the appellee to pay benefits to the appellants in the event of internment of the vessel was measured by wages, but the benefits paid for the period of internment and repatriation were not compensation for services rendered. The articles were not kept alive after the internment simply because a rider attached thereto made provision as to what would be done after the articles were frustrated and the services of the crew terminated. The wages paid the appellants for the period of internment and repatriation were not "earned" wages and were not paid before the United States Shipping Commissioner, and shown on payoff articles as were the wages earned up to December 8, 1941.

The English courts have denied a claim for subsistence predicated on contentions similar to those advanced by appellants. *The Croxteth Hall* and *The Celtic*, 143 L.T.Rep. 316 (1930), P. 179, 18 Asp. Mar. L. 121 (Affirmed by the House of Lords, 18 Asp. Mar. L. 184), were tried together and involved the construction of an English statute reading as follows:

"Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreements, he shall * * * be entitled in respect of each day on which he is in fact unemployed during a period of two months from the date of termination of such service, to receive wages at the rate to which he was entitled on that date."

It will be noted that in the cited cases there was a statutory requirement to pay wages after the termination of services comparable to the contractual requirement in the present case. In the cited cases, the libelants also claimed subsistence in addition to two months' wages allowed under the statute, because their ships were wrecked before the voyages were ended. In denying their claim for subsistence, the court, at Asp. Mar. L. 123, held as follows:

"The claim for subsistence allowance in addition to wages, on the ground that the seamen's remuneration under the articles included his 'keep' was not seriously pressed, and, in my opinion, could not be sustained. The language of the section excludes the claim. The crew are to serve on board, and, in consideration of their service, as the articles state 'the master * * * agrees to pay to the * * * crew as wages the sums against their names respectively expressed and to provide them with provisions according to the scale.' 'Wages' at the rate to which the seaman was entitled under the articles is what the section, within restricted limits, entitled him to receive during a possible two months of unavoidable unemployment."

The circumstances presented in the present case do not permit the implication of an obligation to furnish subsistence under American authorities.

In *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. (2d) 114, 113 P.(2d) 878, the court, in denying the existence of an implied obligation, held as follows:

At page 879:

"It may be stated generally that implied covenants are not favored in the law."

At page 882:

"* * * The rules * * * controlling the exercise of judicial authority to insert implied covenants may be stated as follows: (1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties. (2) It must appear from the language used

that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it. (3) Implied covenants can only be justified on the grounds of legal necessity. (4) A promise can be implied only where it can be rightly assumed that it would have been made if attention had been called to it. (5) There can be no implied covenant where the subject is completely covered by contract."

It is clear that the implied obligation claimed by the appellants does not arise from any language used, nor is it indispensable to effectuate the intent of the parties. It certainly was not so clearly within their contemplation it was deemed unnecessary to express it. The claimed implication is not a legal necessity, and there is no justification for an assumption the promise to furnish subsistence would have been made if attention were called to it. The subject of subsistence and provisions during the voyage was actually covered by the articles as required by statute (46 U.S.C. 564). While in October, 1941, the internment of American vessels was a contemplated possibility, it was the duty of all warring nations to repatriate seamen of neutral countries, and there was no reason to contemplate the internment of such crew members. *Mason v. Texas Co.*, supra at 322. Under other federal statutes, crew members of vessels lost, destroyed, or interned due to war causes are considered destitute seamen, and it also is the duty of the federal government to provide and care for them. (46 U.S.C. 593, 678; *American Mail Line v. United States*, supra; *The Edna*, supra). Even if internment of the *President Harrison* crew were reasonably contemplated, it would be anticipated the very circumstances of internment would make impossible the furnishing of maintenance by the appellee. Moreover, it would be expected at this stage of the war that the interning government would furnish quarters and food to internees in accordance with humane concepts and international law. Accordingly, there is no basis for assuming the appellee would voluntarily accept a needless obligation impossible of performance.

"Where parties * * * have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed same, they have expressed all of the conditions by which they intend to be bound under the instrument."

Maryland v. Baltimore & Ohio R.R., 22 Wall. 105, 89 U.S. 105, 22 L.Ed. 713 at 714.

"Where parties have entered into written engagements which industriously express the obligations which each is entitled to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all of the conditions by which they intend to be bound."

Arthur v. Baron de Hirsch Fund, 121 F. 791 (2 C.C.A.).

There is no reported instance of anyone else having the ingenuity or temerity of counsel in advancing the contention a shipowner is obligated to furnish maintenance to a seaman during his internment by the enemy. Such contentions are equally applicable to the hundreds of American merchant seamen interned during World War II who, like appellants, received benefits measured by wages for the period of their internment. The obvious reason such contentions have not been advanced, much less sustained, is that they have no merit.

CONCLUSION

In conclusion, we summarize the appellee's contentions as follows:

In respect to the claim for war bonus during the period of internment, the rights and obligations of the parties are not defined by the riders alone, which are incomplete and ambiguous. Resort must be had to the supplementary bonus agreements to ascertain the contractual intent of the parties. These collective bargaining agreements are also operative by their own express terms and must be given effect as valid, enforceable contracts binding the parties. The supplementary bonus agreements and the riders are part of the same transaction and must be taken and interpreted together as a matter of construction. Moreover, by virtue of sound legal principle, as well as established practice of the parties, these collective bargaining agreements must be treated as implied parts of the shipping articles and the attached riders, and the latter, as individual contracts of hire, do not, and cannot, vary in terms from the collective bargaining agreements covering the same subject matter.

The supplementary bonus agreements do not provide for the payment of war bonus during the period of internment as held by this court in *The Capillo* case and by the District Court in the present case. The soundness of this construction is apparent from an analysis of the agreements. The same conclusion must be reached in construing the riders and the supplementary bonus agreements together. Extrinsic evidence of related events, prior and contemporaneous, is admissible for the numerous reasons stated, and overwhelmingly proves the parties did not intend to, and did not, provide for the payment of war bonus during the period of internment.

Decision No. 5, Revised, of the M.W.E.B., providing for the same payment of wages during internment as the supplementary bonus agreements and the riders, also, by express terms, effective February 21, 1942, did not provide for war bonus during intern-

ment. As of the date mentioned, the parties were contractually bound by the decisions of the M.W.E.B., but since the same result is reached by the District Court's decision on other grounds, the effect of the decisions of the M.W.E.B. is of no consequence or materiality if the findings and conclusions of the District Court are upheld.

The incidental claim for maintenance during internment cannot be supported under the theory of express promise or the theory of implied promise. There is no precedent in practice or law for the payment of subsistence, or an allowance therefor, during internment. The lack of any merit in this claim is demonstrated by American and English authorities cited and by the absence of any reported instance of such a claim being sustained, or even advanced.

The appellants are entitled to war bonus during their repatriation computed at the rates and in the manner prescribed by the supplementary bonus agreements and the riders attached to the shipping articles, as found by the District Court. The recovery by appellants of this allowance, in addition to the substantial benefits already paid them, marks the limit of appellee's liability to appellants.

Respectfully submitted,

LILLICK, GEARY, OLSON,

ADAMS & CHARLES

IRA S. LILLICK

JAMES L. ADAMS

Proctors for Appellee

(Appendices follow)

Appendices

APPENDIX A

Rider for Passenger and Freight Vessels in the Trans-Pacific and Straits Settlements Service

war bonus*

1. The American President Lines agrees to pay an ~~emergency wage increase~~ of 60% of their basic wages to the licensed crew of the *S.S. President Harrison*, Voyage 55.
2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Masters, Mates and Pilots	Effective December 30, 1939
Marine Engineers Beneficial Assn.	" May 1, 1940
American Communications Association	" July 13, 1940, and as amended by arbitration award of May 3, 1941.

war bonus*

3. This ~~emergency wage increase~~ to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.
4. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port, and the employees shall be repatriated to a Continental United States port. War bonuses

*It was stipulated at the trial that the term "emergency wage increase" used in the rider was intended by the parties to mean "war bonus" (588-589), and this latter term has been substituted herein for purposes of clarification.

at the rates specified in paragraph 1, hereof, shall be paid while employees are in the war zones defined herein.

5. In the event of loss of personal effects by any number of the Licensed Crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each licensed man so affected by an amount not in excess of \$500.00.
6. War risk insurance in the sum of \$5,000 shall be furnished to licensed members of the crew on this voyage in accordance with agreements.

AMERICAN PRESIDENT LINES, LTD.

R. A. FREDIANI (Sgd.)

Deputy U. S. Shipping Commissioner
(SEAL)

APPENDIX B**Rider for Passenger and Freight Vessels in the Trans-Pacific and Straits Settlements Service**

war bonus*

1. The American President Lines agrees to pay an ~~emergency wage increase~~ to the unlicensed crew of the *S.S. President Harrison*, Voyage 55, as follows:
2. The monthly basic wages as shown in the following agreements between the Pacific American Shipowners Association and the Unions are to be used as the basis for payment of this increase:

Sailors' Union of the Pacific	Effective October 10, 1939
Pacific Coast Marine Firemen,	
Oilers, Watertenders and Wipers'	
Association—	" October 1, 1941
Marine Cooks and Stewards' Assn	
of the Pacific Coast—	" July 5, 1940
3. To all employees entitled to receive basic wages of \$120.00 per month or less under said Agreement, the sum of \$80.00 per month.
4. To all employees entitled to receive in excess of \$120.00 per month under said agreement, 66⅔% of such basic monthly wage.
5. This ~~emergency wage increase~~ to apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound.
6. In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the Pacific Ameri-

*It was stipulated at the trial that the term "emergency wage increase" used in the rider was intended by the parties to mean "war bonus" (588-589), and this latter term has been substituted herein for purposes of clarification.

can Shipowners Association and the Unions shown above shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein.

7. In the event of loss of personal effects by any member of the unlicensed crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the Company agrees to reimburse each unlicensed man so affected by an amount not in excess of \$150.00.
8. War risk insurance in the sum of \$5,000 shall be furnished to members of the crews on this voyage.

AMERICAN PRESIDENT LINES, LTD.

R. A. FREDIANI (Sgd.)

Deputy U. S. Shipping Commissioner
(SEAL)

APPENDIX C

Internment provision contained in rider used by American President Lines prior to October 9, 1941:

"In the event the vessel be interned and for that reason be unable to continue her voyage, the company agrees to pay wages including emergency wage increase, to the dates members of the crew arrive in a continental United States port; furthermore the company agrees, in such event, to arrange for repatriation of such men to a continental United States port."

Vessel	Date (1941)	Vessel	Date (1941)
Pres. Taylor.....	1-3	Pres. Taylor.....	5-1
" Cleveland	1-18	" Cleveland	5-6
" Coolidge	1-22	" Monroe	5-17
" Madison	1-31	" Coolidge	5-19
" Pierce	2-5	" Madison	5-29
" Johnson	2-17	" Pierce	6-4
" Taft	2-19	" Fillmore	6-13
" Grant	2-28	" Grant	7-7
" Cleveland	3-5	" Coolidge	7-7
" Jackson	3-5	" Harrison	7-21
" Coolidge	3-19	" Garfield	8-11
" Harrison	3-19	" Monroe	8-28
" Fillmore	3-19	" Coolidge	9-5
" Pierce	4-4	" Taylor	9-8
" Hayes	4-9	Perida	9-24
" Tyler	4-17	Pres. Madison.....	10-3
" Taft	4-18	" Van Buren.....	10-9*
" Garfield	4-23		

*This vessel, opening articles October 9, 1941, employed the above form of rider with an additional rider stating that, "The agreement of October 9 between the Sailors' Union of the Pacific and Pacific American Shipowners Association relative to war bonuses shall apply to this voyage."

APPENDIX D

Internment provision contained in rider for unlicensed personnel used by American President Lines after October 9, 1941:

"In the event the vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic voyages and emergency wages specified in the collective bargaining agreement between the Pacific American Shipowners Association and the unions shown above shall be paid to the date the members of the crew arrive in a continental United States port and the employees shall be repatriated to a continental United States port. War bonuses at the rate specified in paragraphs 3 and 4 hereof shall be paid while employees are in the war zones defined herein."

Vessel	Date (1941)	Vessel	Date (1941)
Pres. Buchanan.....	10-11	Pres. Grant	11-7
Ruth Alexander.....	10-21	" Johnson	12-3
Chant	10-22	" Garfield	12-4
Pres. Coolidge.....	10-30	" Polk	12-5
Day Star.....	11-3	Penant	12-23

APPENDIX E

Internment provision contained in rider used by Matson Navigation Company and Oceanic Steamship Co. prior to October 9, 1941:

"In the event the vessel be interned, and for that reason, be unable to continue her voyage, the company agrees to pay wages, including additional emergency wages, to the date members of the crew arrive in a United States port; furthermore, the company agrees, in such event, to arrange for repatriation of such men to a United States port."

Vessel	Date (1941)	Vessel	Date (1941)
Monterey	1-6	Monterey	6-21
Maui	1-4	Hawaiian Shipper	6-30
Mariposa	2-1	Exporter	7-18
Monterey	3-1	Hawaiian Merchant	7-25
Maui	3-28	Manini	8-15
Mariposa	4-1	Monterey	8-16
Liloa	4-4	Mariposa	9-17
Monterey	4-26	Mapele	10-6
Mariposa	5-22		

APPENDIX F

Internment provision contained in rider used by Matson Navigation Company and Oceanic Steamship Co. after October 9, 1941:

"In the event the vessel be interned, destroyed or abandoned as a result of war operations and unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreements between the parties shall be paid to the date members of the crew arrive in continental United States ports and the employees shall be repatriated to a continental United States port. War risk bonuses at the rate specified in subdivision (b) of paragraph 1 of the supplementary agreements between the parties shall be paid while employees are in the war zones defined therein."

For licensed personnel, the last sentence of the provision reads as follows:

"While the employees are in the war zone areas described in the supplementary agreements covering war risk bonuses payable to Licensed Officers, war risk bonuses shall also be paid to them at the rate of 66 $\frac{2}{3}$ % of said basic wages in areas I to V inclusive, and 25% in area VI."

Vessel	Date (1941)	Vessel	Date (1941)
Hawaiian Merchant.....	10-15	Malama	11-26
Mariposa	11-12	Manini	11-27
Hawaiian Planter.....	11-19	Monterey	12-4
Maunaloa	11-19	Matsonia	12-5

APPENDIX G**Rules of Construction**

"The whole of a contract is to be taken together, so as to give effect to every part of it, if reasonably practical, each clause helping the other."

C.C.C., Section 1641.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties."

C.C.C., Section 1643.

"The words of a contract are to be understood in their ordinary and proper sense, rather than according to the strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

C.C.C., Section 1644.

"Technical words are to be interpreted as usually understood by persons in the professional business to which they relate, unless clearly used in a different sense."

C.C.C., Section 1645.

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intend to contract."

C.C.C., Section 1648.

"Particular clauses of a contract are subordinate to its general intent."

C.C.C., Section 1650.

"Repugnancy in a contract must be reconciled if possible by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

C.C.C., Section 1652.

"Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected."

C.C.C., Section 1653.

"Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention."

C.C.C., Section 1655.

Maxims of Jurisprudence

"Where the reason is the same, the rule should be the same."

C.C.C., Section 3511.

"He who can and does not forbid that which is done on his behalf is deemed to have bidden it."

C.C.C., Section 3519.

"He who take the benefit must bear the burden."

C.C.C., Section 3521.

"Contemporaneous exposition is in general the best."

C.C.C., Section 3535.

"An interpretation which gives it effect is preferred to one which makes void."

C.C.C., Section 3541.

"Interpretation must be reasonable."

C.C.C., Section 3542.

Nos. 11,943 and 11,944

IN THE
United States Court of Appeals
For the Ninth Circuit

JAMES M. AGNEW, JR., et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.
(a corporation),

Appellee.

No. 11,943

(CONSOLIDATED
CASES)

JOHN W. GRIFFIN, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.
(a corporation),

Appellee.

No. 11,944

APPELLANTS' REPLY BRIEF.

ALBERT MICHELSON,

Russ Building, San Francisco 4,

Proctor for Appellants.

FILED
JAN 17 1949

WILLIAM A. O'BRIEN,
CLERK

Subject Index

	Page
1. The shipping articles were plain, certain, and unambiguous, and clearly entitled the libelants to war bonus, at the rates stipulated therein, from the date of their capture by the Japanese to the date they crossed the 180th meridian on the repatriation voyage	1
2. The court erred in admitting oral and written evidence to contradict the terms of the riders attached to the shipping articles	7
3. The District Court erred in denying libelants any recovery for maintenance	8
Conclusion	9

Table of Authorities Cited

Cases	Pages
Agnew v. American President Line, 73 F. Supp. 944.....	4
Alioto v. Imahashi, 9 Cir., 115 F. 2d 324.....	2
Bradley v. The Washington etc. Co., 38 U.S. 89, 10 L. Ed. 72	7
Calmar S.S. Corporation v. Taylor, 303 U.S. 525, 54 S.Ct. 651, 82 L.Ed. 593	5, 8
Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368	5, 8
First National Bank of Chicago v. Rogers, Brown & Co., D.C. Wash., 284 F. 921	8
Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239	5
Harris v. Lambros, App. D.C., 56 F. 2d 488	8
J. I. Case Co. v. N. L. R. B., 321 U.S. 382, 64 S. Ct. 576, 88 L.Ed. 762	4
Jones v. Atlantic Refin. Co., D.C. Pa., 55 F. Supp. 17.....	8
Lewis v. American-Hawaiian S.S. Co., D.C.N.Y., 49 F. Supp. 127	7
Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561	5
McDonald v. United States, 2 Cir., 292 F. 593.....	3
Minnesota S.S. Co. v. Lehigh Valley Transp. Co., 6 Cir., 129 F. 2d 22	7
New England Newsp. Pub. Co. v. United States, D.C. Mass., 18 F. Supp. 674	7
Pacific American Fisheries v. United States, 9 Cir., 138 F. 2d 464	8
Peninsula & Occidental S.S. Co. v. N.L.R.B., 5 Cir., 98 F. 2d 411	3

	Pages
Rees v. United States, 4 Cir., 95 F. 2d 785.....	3
Seas Shipping Co. v. Sieracki, 326 U.S. 700, 66 S.Ct. 872, 90 L.Ed. 413	5
Socony-Vacuum Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 85 L.Ed. 265	5
Steeves v. American Mail Line, 9 Cir., 154 F. 2d 24.....	2, 3, 5, 7
The Bouker No. 2, 2 Cir., 214 F. 831.....	8
The Catalonia, D.C.Va., 236 F. 554	3
The Florence Olson, 9 Cir., 283 F. 11	3
The John L. Dimick, D.C. Me., 13 Fed. Cas. 690, Case No. 7355	8
The Setrain New Orleans, 5 Cir., 127 F. 2d 878	3
The Thomas Tracy, 2 Cir., 24 F. 2d 372	3

Statutes

46 U.S.C.A., sec. 565 (5)	1
46 U.S.C.A., sec. 676 (3)	2

Nos. 11,943-11,944

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Appellants,
vs.

AMERICAN PRESIDENT LINES, LTD.
(a corporation),

Appellee.

No. 11,944

APPELLANTS' REPLY BRIEF.

1. THE SHIPPING ARTICLES WERE PLAIN, CERTAIN, AND UNAMBIGUOUS, AND CLEARLY ENTITLED THE LIBELANTS TO WAR BONUS, AT THE RATES STIPULATED THEREIN, FROM THE DATE OF THEIR CAPTURE BY THE JAPANESE TO THE DATE THEY CROSSED THE 180TH MERIDIAN ON THE REPATRIATION VOYAGE.

The law requires shipping articles to state "the amount of wages which each seaman is to receive". 46 U.S.C.A., sec. 565 (5). The law also provides that the shipping articles "shall be deemed to contain all

the conditions of contract with the crew as to their service, pay, voyage, and all other things". 46 U.S. C.A., sec. 676 (3).

Appellants' position here, as it was in the District Court, is that the law was obeyed; that the shipping articles constitute the contract of employment between appellants and appellee; that the riders prepared by appellee and forming part of the shipping articles are unambiguous; and that the sensible construction of the riders is that appellants are entitled to war bonus for time west of the 180th meridian whether on or off a ship.

Appellee's position here, as it was in the District Court, is that the law was disobeyed; that the shipping articles *and* the collective bargaining agreements between appellee and labor unions whereof appellants were members constitute the contract of employment between appellants and appellee; that the riders prepared by appellee and forming part of the shipping articles are ambiguous; and that under the riders, as interpreted by the collective bargaining agreements, appellants are entitled to war bonus only for time west of the 180th meridian on a ship.

The clash of these conflicting positions presents here, as it did in the District Court an issue of law. On the *de novo* hearing the cause is therefore free of any presumptions in favor of the decree of the District Court. (*Steeves v. American Mail Line*, 9 Cir., 154 F. 2d 24; *Alioto v. Imahashi*, 9 Cir., 115 F. 2d 324, 325.) Appellee's appraisal of "the manner in which

this Court should approach the findings of fact by the District Court" (Bf. Appellee 10-11), is therefore inappropriate.

That the shipping articles, and not the collective bargaining agreements, constituted the contract of employment of appellants, is clear under admiralty law. (*Steeves v. American Mail Line*, 9 Cir., 154 F. 2d 24; *The Setrain New Orleans*, 5 Cir., 127 F. 2d 878, 879; *Peninsula & Occidental S.S. Co. v. N.L.R.B.*, 5 Cir., 98 F. 2d 411, 415; *Rees v. United States*, 4 Cir., 95 F. 2d 785, 792; *McDonald v. United States*, 2 Cir., 292 F. 593, 594-595.)

That the shipping articles must be liberally construed in favor of the appellant seamen and effect given, if possible, to specific contractual language therein, is equally clear under admiralty law. (*Steeves v. American Mail Line*, 9 Cir., 154 F. 2d 24, 25; *The Thomas Tracy*, 2 Cir., 24 F. 2d 372, 373; *McDonald v. United States*, 2 Cir., 292 F. 593, 594-595; *The Florence Olson*, 9 Cir., 283 F. 11, 12; *The Catalonia*, D.C.Va., 236 F. 554, 555-556.)

At pages 12 to 15 of their opening brief, appellants undertook the demonstration that the riders forming part of the shipping articles are unambiguous, and that the natural and sensible construction thereof is that appellants are entitled to war bonus for time west of the 180th meridian whether on or off a ship.

The main contention of appellee is that the riders are ambiguous in that they contain agreements to pay war bonuses for time in "war zones" which are not

defined. The District Court agreed with this contention and held the riders patently ambiguous in such respect. (*Agnew v. American President Line*, 73 F. Supp. 944.) The contention is answered by a plain reading of the riders, for they reflect both intention to define the applicable "war zone" and an accomplishment of that intention. Each rider contains an express agreement on the part of appellee to pay war bonuses. Each rider contains an express agreement that war bonuses shall "apply from the crossing of the 180th meridian westbound until crossing the 180th meridian eastbound". Each rider contains a provision respecting the internment, destruction, or abandonment of the vessel as a result of war operations, immediately followed by specific contractual language that war bonuses "shall be paid while employees are in the war zones *defined herein*". (Emphasis added.) Fairly considered, the riders unmistakably define the applicable "war zone". That "war zone", obviously, is the area to which war bonuses shall apply. That area, obviously, is the area west of the 180th meridian.

Another contention by appellee is that the shipping articles *and* collective bargaining agreement constitute the contract of employment between appellants and appellee. Resorting to labor law, and repeatedly citing *J. I. Case Co. v. N. L. R. B.*, 321 U.S. 382, 64 S.Ct. 576, 88 L.Ed. 762, appellee insists that the collective bargaining agreements must dominate and dictate the interpretation to be accorded the shipping articles. That argument runs counter to the decision of this

court in the *Steeves* case. It is an argument apparently springing from a mistaken belief that when a seaman joins a labor union he ceases to be a ward of the admiralty. The Case decision lends no support to the belief, for it has no concern with shipping articles or admiralty law. And the decisions of the Supreme Court are uniformly reaffirming the proposition that "the ancient characterization of seamen as wards of the admiralty is even more accurate now than it was formerly". (*Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377, 53 S.Ct. 173, 176, 77 L.Ed. 368; *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 654, 82 L.Ed. 593; *Socony-Vacuum Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 85 L.Ed. 265; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 252, 87 L.Ed. 239; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561; *Seas Shipping Co. v. Sieracki*, 326 U.S. 700, 66 S.Ct. 872, 90 L.Ed. 413.)

In the field of labor law, moreover, the Case decision is authority for the rule that members of a labor union are third party beneficiaries under collective bargaining agreements made by the union. And in the field of labor law, the Case decision is also authority for the rule that collective bargaining agreements are not agreements of employment and that members of a labor union may freely enter into any individual agreement of employment which is not inconsistent with collective bargaining agreements or fair labor practices. Nowhere in its brief has the appellee pointed to anything in the collective bargaining agreements prohibiting appellants and appellee from agree-

ing in the shipping articles to payment of war bonus as claimed by appellants here and in the court below.

On turning to the collective bargaining agreements which the trial judge sanctioned as an aid to interpreting the riders when he erroneously held them patently ambiguous in failing to define "war zones", it will be found that they provide for payment of specified rates of "war bonuses", or "war risk bonuses", to "licensed officers", or "members of the union", or "seamen", or "unlicensed personnel", for "voyages" into geographically designated and described "areas", or "war risk areas", or "war risk zones". The applicable "war zone" as therein defined differed in no respect from the applicable "war zone" as defined in the riders.

Because the word "war zones" was used in conjunction with the word "voyages", in the collective bargaining agreements, the trial judge interpreted the riders as entitling appellants to war bonus only for time on a ship west of the 180th meridian. But the trial judge was not at all consistent in his application of this interpretation. Appellants were allowed war bonus for the 17 days they were west of the 180th meridian on the repatriation voyage after liberation. *Appellants were not allowed war bonus for the 3 months they were on the President Harrison west of the 180th meridian after capture and before the Japanese interned them on land west of the 180th meridian.*

The sensible construction of the riders, appellants repeat, is that they are entitled to war bonus for the

time they were in a war bonus area whether on or off a ship. That construction is in accord with the conclusion reached by the court in *Lewis v. American-Hawaiian S.S. Co.*, D.C.N.Y., 49 F. Supp. 127, where seamen were awarded war bonus for the time they were detained at Port Suez, Egypt after their ship had been bombed and destroyed by enemy action.

2. THE COURT ERRED IN ADMITTING ORAL AND WRITTEN EVIDENCE TO CONTRADICT THE TERMS OF THE RIDERS ATTACHED TO THE SHIPPING ARTICLES.

Appellants agree that the rules of evidence are plastic in courts of admiralty. But they disagree with any contention that the rules of evidence are spastic is a court of admiralty or that the court is bound by state statutes or decisions. (*Minnesota S.S. Co. v. Lehigh Valley Transp. Co.*, 6 Cir., 129 F. 2d 22, 29; *New England Newsp. Pub. Co. v. United States*, D.C. Mass., 18 F. Supp. 674, 679.)

In the early case of *Bradley v. The Washington etc. Co.*, 38 U.S. 89, 97, 10 L.Ed. 72, 76, the Supreme Court announced the rule for admiralty courts that "extrinsic evidence is not admissible to explain a patent ambiguity". The District Court violated that rule if it be conceded that the riders were patently ambiguous. Of course appellants make no such concession. The ground of their complaint is that the court erred in admitting oral and written evidence to contradict the terms of riders which were not ambiguous. (*Steeves v. American Mail Line*, 9 Cir., 154 F. 2d 24, 25.)

3. THE DISTRICT COURT ERRED IN DENYING LIBELANTS ANY RECOVERY FOR MAINTENANCE.

The appellee argues that any right to maintenance necessarily ended when the voyage ended. That is not true as a general proposition, for the right to maintenance often survives and continues after the voyage is ended. (*Calmar S.S. Corporation v. Taylor*, 303 U.S. 525, 54 S.Ct. 651, 82 L.Ed. 593.)

“Maintenance” promised an employee as part of his compensation is unquestionably “wages”. (*Pacific American Fisheries v. United States*, 9 Cir., 138 F. 2d 464, 465; *Harris v. Lambros*, App. D.C., 56 F. 2d 488; *First National Bank of Chicago v. Rogers, Brown & Co.*, D.C. Wash., 284 F. 921, 922; *The John L. Dimick*, D.C. Me., 13 Fed. Cas. 690, Case No. 7355; *Jones v. Atlantic Refn. Co.*, D.C. Pa., 55 F. Supp. 17, 22.) By the custom of the sea, “maintenance is an inherent part of the “wages” of every seaman. (*Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368; *The Bouker No. 2*, 2 Cir., 214 F. 831, 833; *The John L. Dimick*, D.C. Me., 13 Fed. Cas. 690, Case No. 7355.)

To withhold from these libelants for the time they were interned as prisoners of war payment in the reasonable value of maintenance of the same quantity and quality they were receiving and entitled to receive would be to deny them part of the basic wages promised by the shipping articles.

As the shipping articles preserved to the seamen the right to continued basic wages after the capture of the

ship, it logically follows that the right to payment of the reasonable value of maintenance, which was a part of the basic wages, likewise and continued after such capture of the ship.

CONCLUSION.

Appellants therefore again respectfully submit that the decree of the District Court should be reversed with directions to the court to award appellants (1) war bonus from the date of their internment to the date they crossed the 180th meridian eastbound on the repatriation voyage (2) maintenance for the period of their internment, and (3) costs.

Dated, San Francisco,
January 14, 1949

ALBERT MICHELSON,
Proctor for Appellants.

Nos. 11,943 and 11,944

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES M. AGNEW, JR., et al.,
Appellants,

VS.

AMERICAN PRESIDENT LINES, LTD.,
(a corporation),
Appellee.

No. 11,943

(CONSOLIDATED
CASES)

JOHN W. GRIFFIN, et al.,
Appellants,

VS.

AMERICAN PRESIDENT LINES, LTD.,
(a corporation),
Appellee.

No. 11,944

APPELLANTS' PETITION TO MODIFY OR AMEND DECISIONS.

ALBERT MICHELSON,

Russ Building, San Francisco 4,

*Proctor for Appellants
and Petitioners.*

MAY 26 1949

Table of Authorities Cited

Cases	Page
Cortes v. Baltimore Insular Line, 287 U. S. 367, 53 S. Ct. 173, 11 L. Ed. 368	2
New York Trust Co. v. Detroit T. & L. Ry. Co., 6 Cir. 1918, 251 F. 514	2
Steeves v. American Mail Line, 9 Cir. 1946, 156 F. 2d 59	2

Statutes	
2 Deering's California General Laws, Act 3757, Usury Law, sec. 1	2
28 U.S.C.A., sec. 837	3
28 U.S.C.A., sec. 1916	3

Rules	
Rules of the Court of Appeals:	
Rule 26, subdivision 4	2
Rule 27	2

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No. 11,944

APPELLANTS' PETITION TO MODIFY OR AMEND DECISIONS.

*To the Honorable William Denman, Chief Judge,
and to the Honorable Albert Lee Stephens and
William E. Orr, Circuit Judges:*

The appellants in the above entitled and consolidated causes respectfully petition for the modification or amendment of the decisions therein, as follows:

Nos. 11,943 and 11,944

IN THE

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For the Ninth Circuit**

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Appellee.

No. 11,944

APPELLANTS' PETITION TO MODIFY OR AMEND DECISIONS.

*To the Honorable William Denman, Chief Judge,
and to the Honorable Albert Lee Stephens and
William E. Orr, Circuit Judges:*

The appellants in the above entitled and consolidated causes respectfully petition for the modification or amendment of the decisions therein, as follows:

1. The appellants in each cause respectfully petition that the decision therein be modified or amended to allow and specially direct interest at the rate of 7% per annum on the claim of each libellant for war bonus from the date of filing the libel.

Subdivision 4 of Rule 26 of the above entitled court provides that "In all cases of admiralty, damages and interest may be allowed, if specially directed by the court". It is uniformly held that in cases of debt due under a written contract interest is recoverable as a matter of right. (*New York Trust Co. v. Detroit T. & L. Ry. Co.*, 6 Cir. 1918, 251 F. 514, 615.) The war bonus claims of the appellants are of that type. Interest should therefore be allowed and specially directed at the rate of interest upon judgments in the State of California. (*Steeves v. American Mail Line*, 9 Cir. 1946, 156 F. 2d 59.) That rate of interest is 7% per annum. (2 Deering's California General Laws, Act 3757, Usury Law, sec. 1.)

2. The appellants in each cause respectfully petition that the decision therein be modified or amended to allow appellants their costs on appeal and also their costs in the trial court.

The decree appealed from was affirmed in part and reversed in part. Under Rule 27 of the above entitled court allowance of the costs on appeal is therefore discretionary. That discretion may be properly exercised in favor of appellants as wards of the admiralty. (*Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377, 53 S.Ct. 173, 176, 77 L.Ed. 368.) The

avowed policy of the law to relieve seamen from costs (28 U.S.C.A., sec. 1916, formerly 28 U.S.C.A., sec. 837) prompts the conclusion that such discretion should be exercised in their favor.

On the appeal appellants challenged as error the failure of the trial court to decree costs in their favor. (Cf. Brief for Appellants, p. 25.) The point has not been decided. The authorities just cited also warrant the modifying or amending of the decree to allow appellants their costs in the trial court.

3. The appellants in cause numbered 11,944, respectfully petition that the opinion therein be modified or amended to show that they were *licensed* personnel on the Steamer President Harrison.

The rider forming part of the shipping articles and applicable to them as *licensed* personnel differed from the rider applicable to the unlicensed personnel with respect to the rate of monthly war bonus. In the case of unlicensed personnel the applicable rider fixed the rate at \$80 monthly. (Cf. Brief for Appellants, p. 4.) But in the case of *licensed* personnel the applicable rider fixed the rate at 60% of basic wages. (Cf. Brief for Appellants, p. 5.) The basic wages for *licensed* personnel were specified in the shipping articles and they are repeated in Column 3 of Exhibit A annexed to the answer to the libel in cause numbered 11,944. (Griffin Apostles, p. 26.) The monthly war bonus claimed by each appellant in the *licensed* personnel and computed upon his said basic wage was set forth in Column 3 of Schedule A annexed to the

libel in cause numbered 11,944. (Griffin Apostles, p. 6.) The figures are undisputed.

The appellants in cause numbered 11,944 are apprehensive that the decision therein may have left it uncertain as to the rate at which the monthly war bonus of each appellant in the *licensed* personnel is to be computed. They therefore respectfully petition that the decision in cause numbered 11,944 be modified or amended to order the entry of a decree in their favor computed at the rate of monthly war bonus set forth in their libel.

WHEREFORE your petitioners respectfully pray that the decisions in the above entitled and consolidated causes be modified or amended in the foregoing respects and particulars.

Dated, San Francisco,
May 25, 1949.

ALBERT MICHELSON,
*Proctor for Appellants
and Petitioners.*

CERTIFICATE OF PROCTOR

I hereby certify that I am proctor for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
May 25, 1949.

ALBERT MICHELSON,
*Proctor for Appellants
and Petitioners.*

libel in cause numbered 11,944. (Griffin Apostles, p. 6.) The figures are undisputed.

The appellants in cause numbered 11,944 are apprehensive that the decision therein may have left it uncertain as to the rate at which the monthly war bonus of each appellant in the *licensed* personnel is to be computed. They therefore respectfully petition that the decision in cause numbered 11,944 be modified or amended to order the entry of a decree in their favor computed at the rate of monthly war bonus set forth in their libel.

WHEREFORE your petitioners respectfully pray that the decisions in the above entitled and consolidated causes be modified or amended in the foregoing respects and particulars.

Dated, San Francisco,
May 25, 1949.

ALBERT MICHELSON,
*Proctor for Appellants
and Petitioners.*

CERTIFICATE OF PROCTOR

I hereby certify that I am proctor for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
May 25, 1949.

ALBERT MICHELSON,
*Proctor for Appellants
and Petitioners.*

IN THE
United States
Court of Appeals
For the Ninth Circuit

JAMES W. AGNEW, JR., et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,943

JOHN W. GRIFFIN, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,944

CONSOLIDATED
CASES

AUGUST FEDERER, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,946

Petition for Rehearing
and
Motion to Stay Mandate

LILLICK, GEARY, OLSON, ADAMS
& CHARLES,
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SUBJECT INDEX

	Page
Introductory Comments	2
The Court's Construction of the Supplementary Bonus Agreements Is Diametrically Opposed to Its Construction of the Very Same Agreements in a Prior Decision.....	4
This Court's Construction of the Supplementary Bonus Agreements Pertaining to Licensed Personnel Is Equally Erroneous and Inconsistent With Its Prior Decision in the Capillo Case.....	13
The Court Has Injected Into Sections 564 and 676 of 46 U.S.C. a Purpose and Effect Never Intended, and, in Construing These Statutes, Has Disregarded the Nature and Effect of Collective Bargaining Agreements Under Other Federal Statutes Which Are of Equal, If Not Paramount, Control.....	23
This Court Has Rewritten the Contracts Between the Parties Instead of Interpreting the Same.....	31
This Court Has Misapplied Rules of Construction and Has Disre- garded Other Paramount Rules of Construction.....	33
This Court Failed to Consider the Applicability of Decisions of the Maritime War Emergency Board Which Preclude Recovery of War Bonus by Appellants During Internment on Land.....	36
In Addition to the Necessity for Correction of the Foregoing Er- rors, There Are Many Other Reasons for Granting a Rehearing in the Present Case.....	43
Certificate of Counsel.....	47

TABLE OF AUTHORITIES CITED

	Pages
CASES	
Amsterdam Syndicate, Inc. v. Fuller, 154 F.(2d) 342, at 343 (8 C.C.A.)	34
Cameron v. U. S., 250 F. 943, 947 (9 C.C.A.) (Affirmed 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659.....	7
Clayton et al. v. Standard Oil Co. of N. J., 42 F. Supp. 734, 1942 A.M.C. 61 (S.D. Tex.).....	25
Duvall v. Craig, 2 Wheat. 45, 4 L.Ed. 180.....	32
Florida C. R. Co. v. Schutte, 103 U.S. 118; 26 L.Ed. 327, 336....	7
Green County v. Quinlan, 211 U.S. 582, 53 L.Ed. 335, at 342....	33
The Harriman, 9 Wall. 161, 19 L.Ed. 629, at 633.....	33
H. J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309.....	24
S. S. India Arrow, 116 F.(2d) 8 (5 C.C.A.).....	30
J. I. Case Co. v. N. L. R. B., 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762	27
Mason v. Texas Co., 76 F. Supp. 318 (D.C. Mass. 1948); affirmed, 171 F.(2d) 559 (1 C.C.A.); certiorari denied, 69 S.Ct. 1156, 93 L.Ed. 1035.....	30, 38, 44
Montoya v. Tide Water Associated Oil Co., 79 F. Supp. 677 (S.D. N.Y.)	38
National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704.....	26
Replegle v. Indian Territory Illuminating Oil Co., 143 P.(2d) 1002 (Okla. 1943)	34
Richmond Screw & Anchor Company v. U. S., 275 U.S. 331; 48 S.Ct. 194; 72 L.Ed. 303, 306.....	7
Riddle v. Mandeville, 5 Cranch. 322, 3 L.Ed. 114, at 116.....	32

	Pages
San Francisco Iron & Metal Co. v. Sweet Steel Co., 23 F.2d 783, 784 (9 C.C.A.)	22
Sheets v. Selden, 7 Wall. 416, 19 L.Ed. 166, at 169.....	32
Steeves et al. v. American Mail Line, Ltd., (The Capillo), 154 F.2d 24	2, 4
The Mayor and City Council of Baltimore v. Baltimore & Ohio R. R. Co., 10 Wall. 543, 19 L.Ed. 1043, at 1045.....	33
Union Pacific R. R. Co. v. Mason City etc. R. R. Co., 199 U.S. 160, 26 S.Ct. 19, 50 L.Ed. 134, 137.....	7
U. S. v. The Brig Grace Lothrop, 95 U.S. 527, 24 L.Ed. 514.....	26
U. S. v. Westwood, 266 F. 696, 697.....	26
Watson v. St. Louis etc. R. R. Co., 169 F. 942, 945 (Affirmed 223 U.S. 745, 32 S.Ct. 533, 56 L.Ed. 639).....	7

STATUTES

Act of July 20, 1840, c. 48, 5 Stat. 394, 395, 397.....	26
Act of February 27, 1877, c. 69, 19 Stat. 252.....	26
Act of March 3, 1897, c. 389, Section 19, 29 Stat. 691.....	26
29 U.S.C., Section 151 et seq.	24
46 U.S.C., Sections 564, 676.....	23, 25, 26, 27, 29

TEXTS

13 C. J. 545	34
17 C. J. S. 754.....	34
17 C.J.S. 755-756.....	22
The China Handbook (1937-1943)	43

Nos. 11,943, 11,944, 11,946

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES W. AGNEW, JR., et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,943

JOHN W. GRIFFIN, et al.,
Appellants,

vs.

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a corporation,
Appellee.

No. 11,944 CONSOLIDATED
CASES

AUGUST FEDERER, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,946

PETITION FOR REHEARING

*To the Honorable Judges of the United States Court of Appeals
for the Ninth Circuit:*

Comes now *American President Lines, Ltd.*, Appellee in the above-entitled consolidated causes, and respectfully petitions this Court for a rehearing upon the grounds and for the reasons hereinafter set forth:

INTRODUCTORY COMMENTS

By its decision in the *Agnew* case (No. 11,943) dated May 5, 1949, amended May 6, 1949, and further amended May 18, 1949, and by its decisions in the *Griffin* case (No. 11,944) and the *Federer* case (No. 11,946) dated May 6, 1949, set aside on May 19, 1949 and supplanted by a per curiam opinion on that day and supplemented by a further decision in the *Griffin* case on May 28, 1949, this Court reversed the decision of the District Court, in part, by decreeing that war bonus was payable to Appellants during their internment and affirmed the decision of the District Court, in part, by decreeing that maintenance was not payable to Appellants during internment. The Appellants in all the consolidated cases have petitioned this Court to modify its decisions and allow Appellants interest and costs but have not challenged the affirmance by this Court of the decree of the District Court denying the recovery of maintenance during internment. This Petition for Rehearing by the Appellee is directed to the reversal by this Court of the decree of the District Court denying recovery of war bonus during internment.

In so reversing the decree of the District Court this Court committed grave error. The written decisions of this Court in the present case do not cite, and reflect no consideration of, a previous decision by this Court on March 13, 1946, in *Steeves et al. v. American Mail Line, Ltd., (The Capillo)*, 154 F.2d 24, in which this Court construed the same collective bargaining agreements (supplementary bonus agreements) as are involved in the present case, in a manner diametrically opposed to the construction placed by this Court on such agreements in the present case. In ruling that shipping articles exclusively define terms of employment of crew members aboard ship, this Court has ascribed to certain Federal statutes a purpose and effect never intended; improperly subordinated the role of collective bargaining agreements under the National Labor Relations Act and decisions of United States Supreme Court; and ignored the applicability of collective bargaining agreements recognized by

the parties in this very case. In its consideration of the riders attached to the shipping articles and the supplementary bonus agreements this Court has misapplied rules of construction and has disregarded other controlling rules of construction. In such connection, this Court, in our opinion, has transgressed the boundaries of judicial function by rewriting rather than interpreting the contracts of the parties. In this regard, it has made interpolations in clauses of collective bargaining agreements to create provision for war bonus during internment notwithstanding that in a previous decision it had held these agreements so clear in excluding the payment of war bonus during internment on land that extrinsic evidence to such effect was held to be neither warranted nor necessary. Despite the fact that the determination of such issue is vital and necessary, the decisions of this Court in the present case indicate that the Court did not even consider the applicability of decisions of the Maritime War Emergency Board which controlled the internment rights of practically all merchant seamen during World War II and which have been judicially construed by other Federal courts as not providing for war bonus during internment on land.

Other reasons for granting a rehearing are indicated by the misconceptions with respect to various features of the case by this Court, evidenced by a series of amendments of and supplements to its original decision; by the pendency on appeal before this Court of two other cases involving the same issue; by the desirability of this issue being orally argued before all of the three judges participating in the decision before a conclusion is reached which will be determinative of all three cases; by the extreme importance of these cases to all parties involved; by the fact that the decisions of this Court in *The Capillo* case and in the present case are the only ones wherein merchant seamen have been awarded war bonus during internment; and by the fact that the Appellants themselves have petitioned this Court for modification or amendment of its decisions.

Before substantiating the foregoing assertions, we request that our forthright challenge of this Court's decisions in the present

case be not construed as to indicate any lack of respect for this Court. To the contrary, our desire to point out to this Court its errors is prompted by our confidence in this Court's objectivity and its willingness and ability to recognize and itself correct those errors, as well as by our desire to obtain complete and correct judicial consideration and determination of all the issues and questions involved in the present case.

**THE COURT'S CONSTRUCTION OF THE SUPPLEMENTARY
BONUS AGREEMENTS IS DIAMETRICALLY OPPOSED TO
ITS CONSTRUCTION OF THE VERY SAME AGREEMENTS
IN A PRIOR DECISION**

Both the Appellants and the Appellee in the present case have claimed support for their respective contentions from the decision of this Court on March 13, 1946 in *Steeves et al. v. American Mail Line, Ltd. (The Capillo)*, supra. That case also involved a claim by merchant seamen for war bonus during internment on land. The rider attached to the shipping articles of *The Capillo* read as follows:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the *S. S. Capillo*, voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

"In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific Coast: furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

"The company agrees to reimburse each man so affected by the amount of \$150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining,

bombing, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

"The company also agrees to carry war risk insurance in the amount of \$2,000.00 for each member of the crew, against loss of life as a result of war perils.

"It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in insurance, which may be granted, as the result of negotiations between the union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached."

In the second paragraph of the *Capillo* rider quoted above, provision was made for the eventualities of the vessel *or the crew* being interned, imprisoned, hospitalized or *put ashore*. It was expressly provided that if the crew be interned, imprisoned or put ashore, wages *and bonus* were to be paid "to the date members of the crew arrive in an United States port, on the Pacific Coast."

This specific and express provision for the payment of war bonus, as well as wages, in the event of the internment of the vessel or the crew was in no respect related to or dependent upon the crew members being in a war zone. Upon the happening of the eventuality contemplated, i.e., internment or putting ashore, etc. of the crew, specific provision was made for the payment of wages and bonus until the crew members were repatriated to the United States. The shipping company in that case sought to qualify this specific provision by reliance on the first paragraph of the rider to the effect that war bonus was to be paid "in accordance with provisions contained in the *applicable** supplementary agreements in effect between the Pacific American Shipowners' Association and various marine unions." In support of its contentions the shipowner introduced and referred to supplementary bonus agreements entered into between the Pacific American Shipowners' Association and the

*Emphasis supplied herein, so indicated.

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, dated October 9, 1941 and with the Marine Cooks and Stewards Association of the Pacific Coast, dated October 10, 1941. Of the four libelants involved in that case, three were members of the first-mentioned union and the fourth, a member of the last-mentioned union.

Both of these supplementary bonus agreements are before the Court in the present case. All of the Appellants in the *Federer* case were admittedly members of the Marine Cooks and Stewards Association of the Pacific Coast and were therefore governed by the aforementioned supplementary bonus agreement with that union dated October 10, 1941 (Bryan's Ex. No. 50). A substantial number of the Appellants in the *Agnew* case were members of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. The aforementioned supplementary bonus agreement with this union dated October 9, 1941, is also before the Court in the present case (Bryan's Ex. No. 48). All of the remaining Appellants of the *Agnew* case were members of the Sailors' Union of the Pacific. The supplementary bonus agreement with this union, dated October 9, 1941, is identical in all material respects with the two supplementary bonus agreements previously mentioned, and, likewise, is before the Court in the present case (Bryan's Ex. No. 47).

The effect of these supplementary bonus agreements was squarely presented to this Court in *The Capillo* case because the Appellee in that case contended that these agreements rendered nugatory the specific provision contained in the second paragraph of the rider, quoted above, calling for the payment of bonus, as well as wages, following internment, until the crew members were repatriated. In rejecting such contention this Court held controlling the word "applicable" contained in the first paragraph of the *Capillo* rider and proceeded then to construe the provisions of these supplementary bonus agreements and to demonstrate that since they provided only for the payment of bonus during the ship's voyage westerly from and

easterly to the 180th Meridian they were not "applicable" to the specific agreement contained in the second paragraph of the *Capillo* rider to pay bonus during the period of internment and until the repatriation of the crew members. The construction of these supplementary bonus agreements was, therefore, a vital and essential determination in the decision of this court in *The Capillo* case. Since the agreements were rejected as not "applicable" because of the Court's construction that they provided for the payment of bonus only during the ship's voyage westerly from and easterly to the 180th Meridian and not during the period of captivity and repatriation, it is inconceivable that such construction by this Court of the provisions of these supplementary bonus agreements could be classified as dictum.

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

Union Pacific R. R. Co. v. Mason City etc. R. R. Co.,
199 U.S. 160, 26 S.Ct. 19, 50 L.Ed. 134, 137.

"It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

Florida C. R. Co. v. Schutte, 103 U.S. 118; 26 L.Ed. 327, 336.

See also:

Richmond Screw & Anchor Company v. U. S., 275 U.S. 331; 48 S.Ct. 194; 72 L.Ed. 303, 306;

Cameron v. U. S., 250 F. 943, 947 (9 C.C.A.) (Affirmed 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659);

Watson v. St. Louis etc. R. R. Co., 169 F. 942, 945 (Affirmed 223 U.S. 745, 32 S.Ct. 533, 56 L.Ed. 639).

We respectfully invite this Court to compare its construction of these supplementary bonus agreements in *The Capillo* case with its construction of these same agreements in the present case. For convenience of comparison, what this Court said about these two agreements in *The Capillo* case is set forth below on the left, and what this Court said about these same agreements in the present case is set forth below on the right.

THIS COURT'S CONSTRUCTION
OF THE SUPPLEMENTARY BONUS
AGREEMENTS IN THE CAPILLO
CASE

"Appellee contends that the two applicable agreements render nugatory the specific agreements of the second paragraph of the rider. Its argument as to the firemen and oilers union agreement, in effect from October 9, 1941, is that it makes no provision for any war bonus during captivity but provides for trans-Pacific voyages for a bonus of \$80.00 per month for the period from the crossing of the 180th meridian westbound until the crossing of the same meridian eastbound. The contention is that since the vessel was destroyed and never could return to the 180th meridian, no bonus is due for the period in captivity and until repatriation, though specifically agreed in the second paragraph of the rider.

"We do not agree. The pertinent word in the first paragraph of the rider with respect to the second paragraph is the word 'applicable' in the phrase 'in ac-

THIS COURT'S CONSTRUCTION OF
THE SAME SUPPLEMENTARY
BONUS AGREEMENTS IN THE
AGNEW AND FEDERER CASES

"That the sailors were captured and held in a war zone is further shown in the supplemental agreement with the sailors clarifying paragraph 5 of the rider, as follows:

"1. The following war bonus rules shall govern the parties hereto—

(a) There shall be five war zones; namely:

* * * *

III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)'

"It is a rational interpretation to regard the men, the vessel and the voyage as *not* the war zone. Rather each of the three is *in* the war zone. The men remained

cordance with the provisions contained in the *applicable* supplementary agreements.' Since, if rational, we must construe the second paragraph to give effect to its agreements, we construe the provision of the union agreement for period of bonus during the return voyage of the ship to the 180th meridian as not 'applicable' to the specific agreement to pay one during the period of captivity after the ship's destruction in Manila.

"The same is true of the cooks and stewards union agreement. There the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian. It is not applicable to a case of the destruction of the vessel and the subsequent period of captivity and repatriation specifically provided for in the second paragraph of the rider.

"It was thought that there was some ambiguity in the provisions of these instruments which warranted testimony as to their meaning. We do not agree. It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. It is a matter of construction whether such union agreements are applicable to make nugatory the specific agreement for the internment."

employees in the zone during the internment, expressly a contemplated incident of the employment contract.

"The war bonus rules concern the employees who are to receive it. Hence 1(a) III, construed in connection with paragraph 6 of the rider, rationally should be read as

" 'III. (For employees on) trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (the war zone is) (After (the employees) crossing the 180th Meridian westbound, until (their) recrossing the same Meridian eastbound.' "

In *The Capillo* case this Court held that the pertinent provisions of the supplementary bonus agreements provide only for the payment of war bonus during the voyage of the vessel westerly from and easterly to the 180th Meridian and that "the union agreements did not provide for the bonus during the period specifically provided in the shipping articles" i.e., during the period of captivity or internment. In fact, this Court held that this meaning of these agreements was so free from ambiguity that "It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles."

The lower court in the present case (73 F. Supp. 944, 949) held:

"The supplementary agreements do not provide for war bonuses during the crew's internment on land. So much has been decided in this Circuit in *Steeves v. American Mail Line*, 9 Cir., 154 F.2d 24. There the court construed two of the same supplementary agreements here involved (Resp. Ex. A, Bryan Ex. 48, 50), and held that the bonus areas therein designated pertained only to the sea and to voyages thereon. Nevertheless, recovery of war bonus in that case was allowed, because the riders to the shipping articles specifically provided for the payment of the bonus to the crew, if they were interned due to war causes, for the period of their internment and until their arrival back in the United States. The Court held this specific provision of the riders to be controlling as against the claim that the supplementary agreements applied. In the latter, the zones were defined in terms of voyages, and, as to Trans-Pacific voyages, were limited to that portion of the voyage occurring west of the 180th meridian. Land was not included within the war zone area therein encompassed. *Steeves v. American Mail Line, Ltd.*, supra."

The Appellants, as well as the District Court, have recognized that this Court construed the supplementary bonus agreements in *The Capillo* case to not provide for the payment of war bonus during internment on land. Nowhere in their briefs or during their oral arguments did Appellants claim or contend

that this Court construed such agreements in *The Capillo* case otherwise.

In its various decisions in the present case this Court has not once referred to its decision in *The Capillo* case and, as far as its decisions reflect, no consideration was given by it to its previous and contrary construction of these same identical supplementary bonus agreements. The disregard by this Court of its prior decision in *The Capillo* case is all the more inexplicable considering that both the Appellants and the Appellee, in their respective briefs and during oral argument, claimed its applicability and relied upon it for support of their respective contentions and that this decision is the only reported decision by any court supporting the proposition that war bonus, in addition to wages, was payable to merchant seamen interned during World War II on land.

Although this Court in *The Capillo* case considered the war bonus period was the *voyage* of the vessel westerly from and easterly to the 180th Meridian, it now by interpolation in the provision defining trans-Pacific voyages in War Zone III creates a geographical war zone west of the 180th Meridian and places the men, the vessel and the voyage in such geographical zone. Suppose the voyage of the S.S. *President Harrison* were as described in War Zone II or V as set forth below:

"II. Trans-Atlantic voyages to Russia (Archangel etc.)
(Whole voyage)

* * * *

"V. Canada (Atlantic Ocean) (While vessel is north of
35 degrees of north latitude when bound to or from
a Canadian port)"

Clearly these zones, as do all the zones defined in the agreements, relate to voyages of a vessel. In War Zone I this is further evidenced by the following terms: "Whole voyage", "if any vessel continues eastbound", "until the vessel crosses the 180th Meridian". In War Zone IV the commencement of the bonus period during trans-Pacific voyages to New Zealand or

Australia is prescribed as "From arrival of vessel in Suva or the crossing of the 180th Meridian."

It should always be kept in mind that these agreements dealt primarily with the subject of war bonus payable in respect to voyages of vessels on which the men were originally employed. The parties were concerned chiefly with the amount of extra compensation that was payable for exposure to war risks while employed on vessels engaged on war hazardous voyages and with what voyages qualified for such extra compensation. Internment or loss of the vessel was only an incident to this paramount consideration and the first three series of supplementary bonus agreements prescribing similar voyage bonuses made no reference whatsoever to such an eventuality (Bryan's Exs. Nos. 11-15, 17-21, 22-26, all inclusive).

In the fourth series of agreements between the Pacific American Shipowners' Association and the West Coast maritime labor unions, entered into in October, 1941 (Bryan's Exs. Nos. 47-51, inclusive), the rate of bonus and the voyages deemed to be hazardous for war causes were still the paramount considerations. In these agreements, however, appear for the first time an incidental provision dealing with the internment, destruction or abandonment of the vessel due to war causes. Repatriation of the men was a contemplated consequence of such a happening. Contemplation of internment of the *crew* was not indicated by any language in the agreements. Since repatriation might take place on other vessels engaged on similarly hazardous voyages, provision was made for the payment of war bonus in the same war zones or on the same voyages as was prescribed for men employed aboard vessels engaged on such voyages.

This type of war bonus was a "sailing" or voyage bonus and it was the standard pattern for war bonuses during World War II both before and after the entry of the United States. The war bonuses fixed by the Maritime War Emergency Board shortly after its creation were of the same type, i.e., voyage bonuses (Nielsen's Ex. Nos. 3, 4, 5, 6 and 7). During later stages of

the war, "Area Bonuses" and "Vessel Attack Bonuses" were also prescribed. (Nielsen's Ex. Nos. 9 and 10.) We respectfully urge the Court to read the Board's explanation of its Bonus Decision 2D on the first page thereof (See Appendix A, hereof).

**THIS COURT'S CONSTRUCTION OF THE SUPPLEMENTARY
BONUS AGREEMENTS PERTAINING TO LICENSED PER-
SONNEL IS EQUALLY ERRONEOUS AND INCONSISTENT
WITH ITS PRIOR DECISION IN THE CAPILLO CASE**

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court construed the supplementary bonus agreement with the National Organization of Masters, Mates and Pilots of America. The mimeographed copy of this agreement introduced in evidence as Bryan's Ex. No. 49 shows the date as October 10, 1941, whereas the original executed agreement bears the date October 20, 1941.*

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court states that if there be a difference between this supplementary bonus agreement and the rider attached to the shipping articles covering licensed personnel, the latter should control, being the *later* document. Since the agreement was actually dated October 20, 1941 and the shipping articles and the attached riders dated October 15, 1941, *the agreement* is the *later* document. This Court, however, then ruled there was no difference between the rider and the licensed personnel union

*This error was called to the attention of the District Court and proctors for the Appellants were invited to confirm or disaffirm the same. No contrary contention was made by Appellants or their proctors. In Appellee's brief before this Court a footnote on page 4 calls attention to the fact that this agreement was dated October 20, 1941, although the mimeographed copy in evidence erroneously shows the date as October 10, 1941. None of the proctors for Appellants in their reply briefs, in their oral argument or in their written summary of the oral argument contested this statement as to the erroneous date shown on Bryan's Ex. No. 49.

agreements with respect to war bonus for licensed officers during internment. In quoting the provisions of the supplementary bonus agreements pertaining to deck and engine room officers, this court rearranged the order in which the quoted provisions actually appear in such agreements. We believe such rearrangement leads to an erroneous conception of the meaning and effect of the provisions. Accordingly, we set forth below to the left the arrangement of these provisions quoted in the supplemental decision by this Court in the *Griffin* case, and to the right the same provisions in the actual chronological order that they appear in the agreements:

COURT'S QUOTATION

"Subject to terms and conditions following, war bonuses shall be paid in the respective areas as above defined, as follows: . . .

"Area IV 66-2/3% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound . . .

"(4) In the event a vessel is *interned*, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port. (Emphasis supplied.)

ACTUAL
CHRONOLOGICAL ORDER

"(2) War risk areas wherein war risk bonuses shall be paid to licensed officers are set forth as follows:

* * * *

"Area IV

"Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula."

* * * *

"Subject to terms and conditions following, war bonus shall be paid in the respective areas as *above defined*, as follows:

* * * *

"Area IV. 66-2/3% of basic wages from the crossing of the 180th meridian, westbound, until recrossing the same meridian eastbound."

* * * *

"While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

"War risk areas wherein war risk bonuses shall be paid licensed officers are set forth as follows: . . .

Area IV Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula."

"(4) In the event *a vessel* is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be *repatriated* to a Continental United States port.

"While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

When the foregoing pertinent provisions of the supplementary bonus agreements pertaining to licensed personnel are considered in the chronological order that they actually appear in the agreement, as set forth in the right-hand column above, it will be immediately recognized that the war risk area with which we are here concerned, to wit, Area IV, is defined only and solely as "Trans-Pacific voyages to Japan, etc." The first portion of the quoted paragraph (2) defines the war risk areas in terms of voyages with no reference whatsoever to the crossing or recrossing of the 180th or any meridian. The voyage is the war risk area. The second part of the quoted paragraph (2) provides the rate or amount of war bonuses that "shall be paid in the respective areas as *above defined*." In respect to Area IV the rate of war bonus is 66-2/3% of the basic wages but it is provided that the payment of such bonus on such voyage or in Area IV "as above defined" commences only "from the crossing

of the 180th meridian, westbound, until recrossing the same meridian eastbound." The reference to the 180th Meridian, therefore, is clearly a restrictive provision limiting payment to that portion of the voyage west of the 180th Meridian. No reference to the 180th Meridian is found in that portion of paragraph (2) that *defines* the war risk areas. It is clear that no geographical area is contained in the definition of war risk areas. The same are defined only in terms of voyages.

Other provisions of these agreements make it equally clear that the war zone areas relate only to voyages of vessels. For instance, it is provided in paragraph (2) that "If any vessel referred to in Area I continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the *vessel* passes the 180th meridian, eastbound, and thereafter no further bonuses will be payable."

Provision is made in paragraph (2) for an automatic adjustment of bonus rates dependent upon an index "based upon the fair average of war risk insurance rates paid on hulls of American flag vessels operating in all areas above described." War risk areas, like war risk insurance rates on vessels, relate only to where vessels operate—obviously not on land.

In paragraph (4) of the licensed personnel agreements recognition is given to the hazards of internment, destruction or abandonment of the *vessel*—not the crew—as a result of war operations and to the inability of the vessel to continue, therefore, her voyage. In such event provision is made that basic wages and emergency wages shall be paid until crew members arrive at a Continental United States port and that they shall be repatriated to a Continental United States port. It is in this latter connection that provision is also made that while the men "are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66-2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI."

It will be seen from the above that although this Court did not have occasion to construe the supplementary bonus agree-

ments affecting licensed personnel in *The Capillo* decision, these agreements compel the construction that war bonus is payable only during voyages and not while crew members are interned on land, just as much as, if not more than, the supplementary bonus agreements involving unlicensed personnel which were interpreted by the Court in *The Capillo* decision. The internment provision of all these licensed and unlicensed union agreements (paragraph (4)) is practically identical in language except for the last or second sentence, which, however, is identical in effect, in that it immediately follows the provision obligating the employer to repatriate the employees to a Continental United States port and provides that war bonus is payable to such employees only while they are in war zones or areas defined or described in the agreements which consist of certain defined voyages. The internment provision of the riders, as discussed hereinafter, is almost word for word the same as the internment provision in paragraph (4) of the union agreements.

In its supplemental decision in the *Griffin* case, this Court referred to the fact that the supplementary bonus agreements were the result of extended prior negotiations. The Court failed to note, however, the significance of such prior negotiations. There is a significant reason why the supplementary bonus agreements affecting licensed personnel differ somewhat in form from the agreements affecting unlicensed personnel. The licensed personnel agreements were patterned, in large measure, after an agreement reached at a conference held in Washington, D.C., terminating August 16, 1941, attended by representatives of ship operators and unions of licensed officers throughout the United States. This conference, called by the United States Maritime Commission to bring about some measure of stability and uniformity in respect to war bonus rates, resulted in an agreement between these ship operators and unions of licensed personnel (Bryan's Ex. No. 34). It will be noted on page 4 of that agreement, that there is a provision dealing with internment, destruction or abandonment of the vessel. It is there

provided that on the happening of such eventuality licensed officers shall be paid wages to the date they arrive in the Continental United States port and that the shipping company shall make arrangements for repatriation of licensed officers to a Continental United States port. There is no provision in the agreement relating to the payment of war bonus following the happening of such an event. During the negotiations, however, that led to this agreement a proposal was made by the unions of licensed officers that war bonus should be paid while the men were repatriated (See Bryan's Ex. No. 33, page 4). This proposal was made a part of the sentence dealing with the repatriation of the men, as follows:

"Furthermore, in such event arrangements shall be made by the company for repatriation of such men to a Continental United States port, and the bonus shall be paid while the men are in the danger areas described above."

It is obvious that the provision dealing with the payment of bonus relates to the repatriation of the men. This proposal by the unions of licensed personnel calling for the payment of war bonus during repatriation was rejected, however, by the representatives of the ship operators. The pencilled notations on Bryan's Ex. No. 33 were made by Mr. Bryan at the time of negotiations and show the striking out of this war bonus proposal (Ap. pp. 242-243*).

Although three series of supplemental war bonus agreements had been entered into between Pacific American Shipowners' Association and the various Pacific Coast maritime labor unions since the spring of 1940 (Bryan's Ex. Nos. 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26), the agreement with the unions of licensed personnel (Bryan's Ex. No. 34) entered into on August 16, 1941 was the first agreement containing any provision dealing with the consequences of intern-

*Ap. designates the Apostles in the *Agnew* case unless otherwise indicated.

ment, destruction or abandonment of the vessel due to warlike operations. Mr. Bryan's testimony is undisputed that there had never been a previous demand for such provision except during the negotiations in May, 1941, when the Sailors' Union of the Pacific asked that wages—not bonus—be paid their members in the event of internment. This request, however, was refused (Ap. pp. 220-225, Bryan's Ex. Nos. 28 and 29).

The fourth series of supplementary bonus agreements entered into in October, 1941 with the unions representing unlicensed personnel were patterned after a decision and recommendation by the National Defense Mediation Board on October 4, 1941 (Bryan's Ex. No. 42). This decision followed hearings before that Board of a controversy concerning war zones and rates of war bonus to be paid members of the Sailors' Union of the Pacific, among others. The recommendations contained in the decision of the National Defense Mediation Board were incorporated in the supplementary bonus agreement negotiated with the Sailors' Union of the Pacific on October 9, 1941 (Bryan's Ex. No. 47). The agreement consummated with this union was then used as the model for the supplementary bonus agreements entered into with the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association on the same day, to wit, October 9, 1941 (Bryan's Ex. No. 48) and the Marine Cooks and Stewards Association of the Pacific Coast on the following day, to wit, October 10, 1941 (Bryan's Ex. No. 50).

It will be noted that the recommendations of the National Defense Mediation Board were incorporated almost verbatim in the three supplementary bonus agreements just mentioned, in respect to the definition of war risk zones or areas in terms of voyages. The decision of the Board, however, contained no recommendation dealing with the eventuality or consequences of the internment, destruction or abandonment of a vessel due to warlike operations.

The internment provision which was incorporated in the three supplementary bonus agreements just mentioned (paragraph 4)

was adopted from the uniform bonus agreement with unions of licensed personnel dated August 16, 1941 (Bryan's Ex. No. 34). A comparison of this internment provision contained in these various agreements demonstrates that the language is almost word for word the same.

However, on this occasion the Pacific American Shipowners' Association granted to these unions of unlicensed personnel the proposal made by the licensed personnel unions in August, 1941, calling for the payment of war bonus while men were being repatriated following the internment, destruction or abandonment of their vessel (Ap. pp. 243-244). In the drafting of this internment provision a change was made in punctuation and the obligation of the shipowner to repatriate the men was made a part of the first sentence of the internment provision and the provision relating to the payment of war bonus during repatriation was made the subject of a second sentence. This same pattern was followed in the supplementary bonus agreements with unions of licensed personnel (paragraph 4) entered into with the Marine Engineers Beneficial Association on October 15, 1941 (Bryan's Ex. No. 51) and with the National Organization of Masters, Mates and Pilots of America on October 20, 1949 (Bryan's Ex. No. 49).

The riders attached to the shipping articles of the *President Harrison* on October 15, 1941, were changed to conform to the internment provision incorporated in paragraph 4 of the unlicensed union agreements of October 9 and 10, 1941, and adopted the provision for the payment of war bonus during the repatriation of crew members. This is readily demonstrated by comparing the form of rider used by Appellee prior to this time (see Appendix C of Appellee's brief) with the form of rider used on the shipping articles of the *President Harrison* and other vessels of the Appellee sailing after October 9, 1941 (see Appendix A, B and D of Appellee's brief). The draftsmen of the internment provision in this new form of rider used by Appellee unhappily conformed too strictly to the language contained in paragraph 4 of the agreements and adopted the word

"herein" in reference to the term "war zones." The word "herein" as used in the supplementary bonus agreements obviously related to the war risk zones or areas defined in terms only of voyages of vessels and it is irrational to believe that the language of the rider intended anything different. In this respect it should be noted that the plural term "war zones" was also used in the rider as in the agreements. Not even the Appellants have contended there was more than one war zone defined in the rider whereas there were five or six war zones defined in the agreements to which the plural term "war zones" had reference.

The new form of rider used by Appellee on the shipping articles of the *President Harrison* also reflected the increase in war bonus rates made in the union agreements and enlarged the portion of the voyage eligible for bonus by changing the terminus from the 160th to the 180th Meridian as had been done in the agreements (compare Ex. D). This also is most convincing evidence that the new rider used by the Appellee on the *President Harrison* shipping articles was intended only to carry out the recently negotiated union agreements. This is even further demonstrated by the fact that the rider for licensed personnel (Appellee's brief, Appendix A) specified the rate of war bonus at the old and lower rate of 60%. Bearing in mind that the shipping articles were opened on October 15, 1941 and that the supplementary bonus agreement with the union of licensed engineers (Bryan's Ex. No. 51) was entered into on the same day and that the supplementary bonus agreement with the union of licensed deck officers (Bryan's Ex. No. 49) was entered into on October 20, 1941, it is readily understood why the licensed personnel rider attached to the articles did not reflect the new and increased war bonus rates of 66-2/3% specified in such agreements.

The parties in all of these consolidated cases and the unions representing all of Appellants have consistently recognized by their conduct and practical construction that these collective bargaining agreements consisting of the supplementary bonus

agreements were the controlling contracts, and that the riders were intended only to reflect the provisions of these paramount collective bargaining agreements. After the Appellants were repatriated, the licensed officers were paid war bonuses covering the period of the voyage of the *President Harrison* following its crossing of the 180th Meridian, westbound, until the capture of the vessel on December 8, 1941, not at the 60% rate prescribed in the licensed personnel rider but at the 66-2/3% rate prescribed in the supplementary bonus agreements (Ap. p. 523). Payments at these rates are undisputed.

Similar recognition by the parties in these consolidated cases that collective bargaining agreements as well as the shipping articles govern the terms of employment aboard ship, irrespective of whether such agreements are referred to in the shipping articles or not, is indisputably manifested by the payments made to Appellants following their repatriation to the United States in the form of wages, both for the period spent aboard the vessel prior to its capture on December 8, 1941 and for the period of internment and subsequent repatriation. These wages were measured not by the lower rates contained in the basic agreements in effect at the time the shipping articles were opened on October 15, 1941 and specifically referred to in the riders, but at increased rates provided for in basic agreements negotiated subsequently to October 15, 1941. (See discussion in Appellee's brief, pp. 28-31).

"Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction may be considered by the court in construing the contract, determining its meaning, and ascertaining the mutual intention of the parties at the time of contracting; it is entitled to great, if not controlling, weight in determining the proper interpretation of the contract; and it will generally be adopted by the court."

17 C.J.S. 755-756.

See also:

San Francisco Iron & Metal Co. v. Sweet Steel Co., 23 F. 2d 783, 784 (9 C.C.A.).

THE COURT HAS INJECTED INTO SECTIONS 564 AND 676 OF 46 U.S.C. A PURPOSE AND EFFECT NEVER INTENDED, AND, IN CONSTRUING THESE STATUTES, HAS DISREGARDED THE NATURE AND EFFECT OF COLLECTIVE BARGAINING AGREEMENTS UNDER OTHER FEDERAL STATUTES WHICH ARE OF EQUAL, IF NOT PARAMOUNT, CONTROL

In its written decision in the *Agnew* case of May 18, 1949, this Court refers to Section 676, 46 U.S.C., and, in effect, holds that statute requires shipping articles be deemed the exclusive contract governing terms of employment of crew members aboard vessels. In its supplemental written decision in the *Griffin* case, dated May 28, 1949, this Court also refers to Section 564, 46 U.S.C., and impliedly, if not directly, ascribes to that statute a similar purpose and effect.

It is Appellee's position that while these statutes require written agreements in the form of shipping articles to be entered into between the master and crew, and while these statutes specify what subject matter is to be covered by shipping articles, they in no sense require that all terms of employment governing crew members aboard vessels must be set forth in the shipping articles, or even referred to therein, nor do they preclude other currently effective contracts to be entered into between the parties governing terms of employment of the crew members aboard vessels. Appellee emphatically contends that these statutes do not nullify, or preclude consideration of, collective bargaining agreements covering crew members which may govern the same, as well as different, terms of employment as those required to be set forth in the shipping articles by Sections 564 or 676, 46 U.S.C. Examples of terms of employment that are specified in collective bargaining agreements but not in shipping articles but which, nevertheless, are universally held operative and binding include, among others, overtime provisions fixing regular and overtime hours and rates of pay, transportation rights, uniform, clothing and meal allowances, holidays, working rules,

grievance machinery, etc. (For example, see Bryan's Ex. No. 55).

The principle here involved transcends in importance the result of this particular case and we believe upon reconsidering the matter this Court must conclude that these two statutes in no way interfere with the validity and effectiveness of co-existing collective bargaining agreements, which are the natural and intended result of collective bargaining under the National Labor Relations Act (29 U.S.C. 151 et seq.). Under the latter Act, as interpreted by the United States Supreme Court, employers are not only obligated to recognize representatives of their employees for purposes of collective bargaining, are not only required to engage in collective bargaining with such representatives, but, in addition, having reached an agreement with such collective bargaining representatives, are further required to reduce such agreement to writing and to sign the same. (*H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309.) It is inconceivable that upon the accomplishment of this objective, such collective bargaining agreements, so reduced to writing and executed, are not to be given full force and effect or are not to be recognized by the courts as binding and effective upon the parties thereto upon some theory that under statutes enacted years ago for the protection of seamen from harsh treatment, shipping articles exclusively govern terms of employment aboard vessels.

Collective bargaining agreements between shipowners and maritime labor unions concerning seafaring personnel necessarily, of course, relate to the terms of employment of such personnel aboard vessels. Under the ruling of this Court in the present case collective agreements are to be disregarded in determining the rights and obligations of a shipowner and the crew members employed aboard his vessel, unless the terms of such agreements are set forth or referred to in the shipping articles. Not only is this proposition contrary to the long-established practice in the shipping industry, but it is violative of, and in con-

flict with, the very objectives and purposes of the National Labor Relations Act, as well as common sense and sound policy.

This subject has been heretofore discussed at length by us in Appellee's brief (pp. 26-28), and we there pointed out the case of *Clayton et al. v. Standard Oil Co. of N. J.*, 42 F. Supp. 734, 1942 A.M.C. 61 (S.D. Tex.), where, although the collective bargaining agreement in question was not referred to in the shipping articles, the record showed the parties intended both it and the shipping articles to govern. The Court accordingly ruled:

"The shipping articles between libelants and respondent and the agreement between the National Maritime Union and respondent, construed together, must be regarded as the contract between libelants and respondent."

This, we submit, is the sound rule that should be applied in such situations. Where it is clear, as in the present case, that the parties intend to be governed by a currently effective collective bargaining agreement as well as by the shipping articles, these two documents must be construed together as the contract governing the terms of employment of crew members aboard vessels. The record in the present case is replete with evidence demonstrating that all parties involved considered they were bound, not only by collective bargaining agreements referred to in the riders, but also by the supplementary bonus agreements, entered into at the same time, within a matter of days, that the shipping articles were opened on October 15, 1941. The record further demonstrates, without contradiction, that the parties also recognized as applicable and effective basic collective bargaining agreements which were not referred to in the shipping articles and which were subsequently negotiated and consummated in October and November, 1941, but made retroactive by express terms to October 1, 1941 (see discussion in Appellee's brief, pp. 38-31).

What we have stated above in respect to Sections 564 and 676, 46 U.S.C., is all the more understandable when consideration

is given to the nature and legislative history of these statutes. Section 676 found its origin in the Act of July 20, 1840, c. 48, 5 Stat. 394, 395, 397, and in the Act of February 27, 1877, c. 69, 19 Stat. 252. A careful analysis of Section 676 demonstrates that clause "Third", describing the contents of shipping articles, is purely incidental to the main purposes of the statute. We know of no other decision holding this statute requires all terms of employment of seamen aboard vessels to be set forth in the shipping articles.

Section 564, 46 U.S.C., was enacted subsequent to Section 676, and its main purpose more closely related to the provisions that are to be contained in shipping articles. This statute has its origin in the Act of March 3, 1897, c. 389, Section 19, 29 Stat. 691. The legislative history of this statute is discussed at length by the United States Supreme Court in *U. S. v. The Brig Grace Lotthrop*, 95 U.S. 527, 24 L.Ed. 514. The statute was considered by the Circuit Court of Appeals for the Fourth Circuit in *U. S. v. Westwood*, 266 F. 696, where, at 697, the Court held, in part, as follows:

"Shipping articles are mercantile documents, and are entitled to a liberal construction in order to accomplish the purpose the parties had in mind. They are not to be scrutinized as if they were legal pleadings."

The effectiveness of collective bargaining agreements concurrently with shipping articles conforming to Section 564, 46 U.S.C., was recognized by the United States Supreme Court in the case of *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704. In that case, the United States Supreme Court explained the purpose of this and similar statutes as follows (84 L.Ed. at 709):

"The design was to protect seamen from being carried to sea against their will; to prevent mistreatment as to wages, and to assure against harsh application of the iron law of the sea during voyages."

We believe the situation of seamen today, with their membership in maritime labor unions, who diligently and vigorously

protect their rights, has been realistically and correctly stated by the trial court below (Ap. 566-568; 73 F. Supp. 948).

As we have heretofore stated, we believe the sound and logical rule to be, where it is clear, as here, that the parties intend to be bound by concurrently effective collective bargaining agreements as well as shipping articles, that these two documents must be taken together as the contract governing terms of employment aboard a vessel. We certainly challenge the proposition that, as between collective bargaining agreements and shipping articles, the latter contract is entitled to greater sanctity or is of paramount importance. In fact, if a choice must be made between the two contracts, it is the collective agreement, rather than the individual contract of hire in the form of shipping articles, that is paramount. We submit that the objectives of Sections 564 and 676, 46 U.S.C. and the National Labor Relations Act are defeated rather than served by ascribing to the former statutes a requirement that shipping articles must exclusively contain all terms of employment and by denying to seamen the protection afforded by collective bargaining in their behalf and the benefits obtained from resultant collective agreements.

The supplementary bonus agreements were effective and operative by their own express terms. As discussed in Appellee's brief, these collective bargaining agreements gave rise to valid enforceable obligations, binding both the employer and the employee (pp. 16-17). In Appellee's brief, we also cited and discussed authorities establishing the proposition that collective bargaining agreements, by law are not only made a part of individual contracts of hire, but cannot be changed by the terms of the latter. We also pointed out and discussed the enunciation of the principle by the United States Supreme Court in *J. I. Case Co. v. N. L. R. B.*, 321 U.S. 332, 64 S. Ct. 576, 88 L.Ed. 762, that individual contracts of hire are not immune to the operation of collective bargaining agreements because of the possibility that the former may be more individually advantageous. Such a

principle is as much protective of the rights of the employee as of the employer. Advantages granted to individuals by contracts of hire may be disruptive of industrial peace and may be the means of undermining the strength and effectiveness of collective bargaining representatives. Where a group of employees have chosen their collective bargaining representative, individual advantages, often gained at the expense of the employee group, must be foregone and should be considered as a contribution to the collective result (see Appellee's brief pp. 33-36).

The circumstances of the present case call for the full application of the foregoing principle. The supplementary bonus agreements involving unlicensed personnel were the result of collective bargaining; a deadlock; a submission of the controversy relating to war zones and the rates of war bonus to the National Defense Mediation Board; a decision by that Board recommending new and increased bonus rates, defining the war zones where payable, and prescribing machinery for the future adjustment of such war bonus questions; and further collective bargaining culminating in the incorporation of the recommendations of the Board in a collective bargaining agreement. These agreements were consummated only four or five days prior to the opening of the shipping articles of the *President Harrison* on October 15, 1941. As pointed out in Appellee's brief (pp. 36-38), the very provisions of these collective bargaining agreements indicated that all further individual action, other than through the collective bargaining process, was prohibited. Lockouts, strikes, slow-downs or like action were banned. Machinery was agreed upon for the adjustment of future questions.

In its supplemental decision in the *Griffin* case dated May 28, 1949, this Court stated that it is irrational to suppose that the Appellee entered into the shipping articles and the agreement created by the attached riders without intent that it was to be *the* binding agreement for the voyage. We submit that it is irrational to suppose that the supplementary bonus agreements were entered into on the various dates involved in October, 1941,

without intent by the parties that such collective bargaining agreements, effective by their own terms commencing October 1, 1941, would be *the* binding agreements for the voyage in respect to the subject of war bonus. These supplementary bonus agreements prescribed new and increased rates of war bonus; defined new war zones or areas; provided machinery for future adjustments of questions relating to such subjects; provided, for the first time, in so far as unlicensed personnel was concerned, for the payment of wages until the repatriation of the men to the United States, if the vessel were interned, destroyed or abandoned; and further provided for an obligation by the ship-owner to repatriate the men and to pay them war bonus while in war zones during the course of such repatriation. It seems to us wholly illogical and irrational to deduce from these circumstances that, when the shipping articles were opened a few days later, on October 15, 1941, the parties intended by the riders, revised in form to conform with such agreements, to do anything other than to carry out and reflect this detailed agreement concerning war bonuses contained in the collective bargaining agreements consummated only a few days prior.

With the pattern established by the supplementary bonus agreements for unlicensed personnel entered into on October 9 and October 10, 1941, the statements above are equally applicable to the supplementary war bonus agreement covering the licensed engineers, executed on October 15, 1941, and the supplementary bonus agreement covering the licensed deck officers entered into on October 20, 1941.

What we have stated above in discussing the effect that should be given to Sections 564 and 676, 46 U.S.C., is wholly unrelated to a situation involving ambiguity in shipping articles and the question of admissibility of extrinsic evidence to remove or clarify such ambiguity. Existence of ambiguity in the shipping articles sets in force a wholly different, but equally forceful, argument for the consideration of evidence *dehors* the shipping articles to remove such ambiguity. A most recent enunciation

of the legal principles governing this situation, in a case also involving a claim by seamen for war bonus during internment on land, is found in *Mason v. Texas Co.*, 76 F. Supp. 318 (D.C. Mass. 1948); affirmed, 171 F.(2d) 559 (1 C.C.A.); certiorari denied, 69 S.Ct. 1156, 93 L.Ed. 1035. In that case, the District Court ruled as follows (at 321):

"And as in the interpretation of any other contract where there is ambiguity, extraneous evidence is admissible to aid in the construction of ship's articles."

Another case remarkably similar to the present one, and involving a claim for the recovery of war bonus, is that of the *S. S. India Arrow*, 116 F.(2d) 8 (5 C.C.A.), which is discussed and extensively quoted in Appellee's brief (pp. 20-23). In that case, the Court was confronted with the problem of determining what was meant by the term "Spanish ports," and evidence of the genesis of the term was admitted and considered to show that the provision was adopted from a Maritime Commission contract which provided for payment of bonus only in ports of Spain. A most analogous situation exists in the present case by virtue of the ambiguity and incompleteness arising from the phrase contained in the riders, "war zones defined herein." As found by the District Court, and as we believe a fair construction by this Court requires, there is no war zone, and, much less, no war zones, defined in the riders. There is as much, if not more justification here to refer to the genesis of this term, i.e., the supplementary bonus agreements, as there was to refer to the genesis of the term "Spanish ports" in the case of the *S. S. India Arrow*.

It is, perhaps, pertinent to point out here another error contained in this Court's decision in the *Agnew* case of May 28, 1949. On page 4, this Court stated that the District Court reached its conclusion denying war bonus during internment "by holding that no war zone of the last sentence in paragraph 6 of the rider was 'defined' in the rider, and a supplemental war zone rules agreement, and hence it could determine the sailors'

contract with the owner by evidence *dehors* the rider and agreement." This is an erroneous conception of the District Court's decision. What the District Court actually found was that "Resort must be made to the supplementary bonus agreements in order to determine the real contractual intent of the parties in respect to the claim of the libelants for war bonus during their internment from December 8, 1941, to their repatriation to and arrival at a continental United States port. Such intent cannot and should not be determined from the riders alone." (Ap. 592-593).

The District Court's decision that the parties did not contract for the payment of war bonus during internment, therefore, did not depend upon evidence extraneous to the written contracts between them, consisting of the riders attached to the shipping articles and the supplementary bonus agreements. The ambiguity and incompleteness of the riders was resolved by the District Court by reference to the origin of this language found in another contractual document between the parties, to wit, the supplementary bonus agreements.

THIS COURT HAS REWRITTEN THE CONTRACTS BETWEEN THE PARTIES INSTEAD OF INTERPRETING THE SAME

We believe that the interpolations made by this Court in certain paragraphs of the riders quoted in its written decisions demonstrate as clearly as anything else the incompleteness and ambiguity of the riders in respect to the non-definition of war zones. We submit that if such provisions were complete and unambiguous, there would be no necessity to insert 19 words, as did this Court, in a 20-word clause to make it read as a war zone definition.*

We may again incidentally point out that the term used in the internment provision of the riders is a plural one, to wit, "war zones." Even with its interpolations in the provisions of

*In respect to paragraph 3 of the licensed personnel rider the court inserted 21 words in a 20-word clause.

the rider relating to crossing and re-crossing the 180th meridian, this Court has defined only one war zone. We submit even additional interpolations in such provisions of the riders cannot construct definitions of war zones as contrasted with a single zone. This in itself demonstrates that the war zones the parties had in mind, in the use of that plural term in the internment provision, are not to be found in the riders, and that resort must be made to the supplementary bonus agreements, where there are definitions of five or six different war zones.

The United States Supreme Court has repeatedly condemned the judicial creation of contracts rather than the interpretation of contracts actually entered into by the parties. In *Riddle v. Mandeville*, 5 Cranch. 322, 3 L.Ed. 114, at 116, Chief Justice Marshall stated that even a court of chancery will not create contracts into which parties have never entered, nor decree the payment of money from persons who have never undertaken to pay it. There are innumerable other decisions denouncing this practice.

"This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them.

Sheets v. Selden, 7 Wall. 416, 19 L.Ed. 166, at 169.

"The case ought to be a very strong one, which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could exist of the real intention of the parties to create such a restriction."

Duvall v. Craig, 2 Wheat. 45, 4 L.Ed. 180.

"It is always competent for parties capable of entering into a business arrangement to fix the terms of it, and to declare what shall be their respective rights and liabilities under it. If the court can in any case see that this has been done, it is required to give effect to the contract which the parties chose to make for themselves, although, in the

absence of a special agreement on the subject, the rule to determine the rights of the parties might be different."

The Mayor and City Council of Baltimore v. Baltimore & Ohio R. R. Co., 10 Wall. 543, 19 L.Ed. 1043, at 1045.

"It is the province of courts to enforce contracts—not to make or modify them."

The Harriman, 9 Wall. 161, 19 L.Ed. 629, at 633.

"But courts cannot make for the parties better agreements than they themselves have been satisfied to make."

Green County v. Quinlan, 211 U.S. 582, 53 L.Ed. 335, at 342.

We have already commented upon the inconsistency of this Court's action in the present case in interpolating the definition of the pertinent war zone or area contained in the supplementary bonus agreements so as to create a geographical war zone or area, when, in its decision in *The Capillo* case, this Court, in construing the same provisions, stated "the war bonus period is during the ship's voyage westerly from and easterly to the 180th meridian."

THIS COURT HAS MISAPPLIED RULES OF CONSTRUCTION AND HAS DISREGARDED OTHER PARAMOUNT RULES OF CONSTRUCTION

In its decision in the *Agnew* case of May 28, 1949, this Court stated that, because the riders were prepared by the Appellee, they must be construed most strongly against it. This rule of construction is applicable only where the document in question is deemed to be ambiguous. This Court held, however, in the same decision—we submit, of course, erroneously—that the riders are not ambiguous. As stated in 12 Am. Jur. 796:

"The rule that expressions will be interpreted against the person using them applies only where, after the ordinary

rules of interpretation have been applied, the agreement is still ambiguous."

We accordingly submit that the application of this rule of construction is clearly erroneous on the face of the Court's decision, and is wholly inconsistent with its other finding that the riders were not ambiguous.

We contend, of course, that the riders are incomplete and ambiguous for the many reasons previously discussed. Even under such circumstances, however, this rule of construction has no place in the present case, because, by the application of other paramount and controlling rules of construction, the ambiguity is completely resolved and eliminated.

"The general rule is that a contract will be construed against a party using words only if a satisfactory result cannot be reached by other rules of construction."

Amsterdam Syndicate, Inc. v. Fuller, 154 F.(2d) 342, at 343 (8 C.C.A.).

"The rule [that a written contract must be interpreted against the person responsible for ambiguities in it] is subservient to the rule which requires reference to attending circumstances to determine the meaning and purpose of the language used by the contracting parties."

Replogle v. Indian Territory Illuminating Oil Co., 143 P.(2d) 1002 (Okla. 1943).

The rule that, where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, "is the last one which the courts will apply, and then only if a satisfactory result cannot be reached by other rules of construction."

13 C. J. 545

17 C. J. S. 754

We have heretofore cited and discussed decisions—most pertinent to the present case because they also involve the recovery of war bonus—which stand for the proposition that extrinsic

evidence is admissible to clarify and remove ambiguities in written contracts, including shipping articles. As is, of course, well known by this Court, the rules of evidence in Admiralty courts are more liberal than those in common-law courts. There can be no doubt that in Admiralty, as well as in common-law courts, extrinsic evidence is admissible to clarify ambiguities contained in contracts. Authorities dealing with this subject in Admiralty cases are discussed in Appellee's brief (pp. 45-47).

There are numerous other rules of construction which are applicable to remove the ambiguity contained in the riders before resort may be made to the rule of construction applied by this Court resolving ambiguities against the party deemed responsible for it. In Appellee's brief, we have invoked the rule of construction calling for effect and reasonable meaning to be given to all parts of an instrument. We have cited the rule that calls for an interpretation giving effect to the apparent main purpose of the contract. Similarly, we have demonstrated that, in the interpretation of agreements, the prime object and purpose of the parties should be ascertained, and that ambiguity in minor provisions should be construed not to conflict with the main purpose. We have shown that words used in a certain sense in one part of a contract (the supplementary bonus agreements) are deemed to have been used in the same sense in another part of the contract (the riders).

The construction of the supplementary bonus agreements and the riders adopted by the District Court gives effect to the general purpose of the contract, does not render meaningless any specific term, but, on the contrary, gives meaning to and reconciles the paragraph in the riders referring to the 180th meridian, and consequently ascribes to the plural term "war zones" in the riders the same sense in which this term is used in the balance of the contract; i.e., in the supplementary bonus agreements. The interpretation adopted by this Court does violence to, and conflicts with, all these accepted rules of construction (see discussion in Appellee's brief, pp. 41-44).

In Appellee's brief, we have also discussed the finding by the District Court (Ap. 595, 599) that the shipping articles with attached riders and the supplementary bonus agreements were writings and contracts relating to the same matters and entered into by and in behalf of the same parties, at substantially the same time, and are parts of substantially one transaction, and that, accordingly, these documents all must be taken together as parts of the same or a single transaction. We have also discussed United States Supreme Court and California authorities enunciating this rule of construction (see Appellee's brief, pp. 31, 32).

In its decisions, this Court also applied the principle that contracts must be interpreted liberally in favor of seamen, in line with the traditional solicitude of the courts of Admiralty for their physical and economic well-being. We have already commented on the protection afforded the Appellants in this case through the vigilant efforts of their unions, and have pointed out the realistic appraisal made of these circumstances by the District Court in its written decision. We submit that such principle, even if not outdated, has no application to collective bargaining agreements nor to riders attached to shipping articles which are intended only to conform to such agreements and are not the subject of separate negotiation.

**THIS COURT FAILED TO CONSIDER THE APPLICABILITY OF
DECISIONS OF THE MARITIME WAR EMERGENCY BOARD
WHICH PRECLUDE RECOVERY OF WAR BONUS BY AP-
PELLANTS DURING INTERNMENT ON LAND.**

In respect to the claim of Appellants for war bonus during internment on land, we urged before the District Court, and have heretofore urged before this Court, consideration of the applicability of the decisions of the Maritime War Emergency Board only in the event that there was disagreement with our contentions that the shipping articles with attached riders and the supplementary bonus agreements did not provide for the

payment of war bonus during internment on land. The riders attached to the shipping articles, the supplementary bonus agreements, and the decisions of the Maritime War Emergency Board *all* provided for the payment of wages during internment. Since the Appellee paid Appellants, upon their repatriation, wages during the entire period of their internment and subsequent repatriation, and since the recovery of wages for these periods is not in controversy, it makes no difference whether the payment of these wages by Appellee was in discharge of its obligations under the riders attached to the shipping articles, the supplementary bonus agreements, or the decisions of the Maritime War Emergency Board. Furthermore, if it is held that the shipping articles with attached riders and the supplementary bonus agreements do not provide for the payment of war bonus during internment on land, it is also immaterial whether the decisions of the Maritime War Emergency Board superseded these previous contractual instruments in such respect.

However, in view of the decisions of this Court in the present case holding that the riders attached to the shipping articles and the supplementary bonus agreements are to be construed as allowing the recovery of war bonus during internment on land, it becomes vital and necessary to consider the applicability and effect of the decisions of the Maritime War Emergency Board. Despite this fact, this Court did not pass on or determine this vital issue in its decisions in the present case.

We are mindful that, in its decision in *The Capillo* case, this Court, on the basis of the record then before it, held that the decisions of the Maritime War Emergency Board were not effective or controlling. This view, taken by this Court, was predicated on four grounds. The first ground related to the construction of the term "in effect" contained in the *Capillo* rider, and it was held that this term did not mean "hereafter to be made." This ground, of course, is not applicable to the present case, where the construction of such a term is not in question.

The second ground was based on the belief by this Court that jurisdiction of the Maritime War Emergency Board depended upon the existence of a dispute between a steamship operator and a union. The record in the present case clearly demonstrates that the jurisdiction of the Board was not limited in such respect and that it exercised the powers granted to it continuously and on its own initiative, and quite irrespective of whether ship operators and unions had any disputes respecting the rates of war bonus payable or the voyages in respect to which war bonus was payable. This is demonstrated, without contradiction in the record, by the deposition of Erich Nielsen, Secretary of the Maritime War Emergency Board (Ap. 62-118). This proposition is also made indisputably clear by a single exhibit contained in the record (Nielsen's Exhibit No. 18; see also 1944 A.M.C. 1020). In addition to the District Court in *The Capillo* case, which took an opposite view, the views of this Court, as expressed in *The Capillo* decision, and based, of course, solely on the record in that case, were not shared by the District Court in *Mason v. Texas Co.*, 76 F. Supp. 318 (D.C. Mass.) decided on February 24, 1948, or by the United States Court of Appeals for the First Circuit, which affirmed the District Court's decision in the case cited on January 5, 1949 (171 F.(2d) 559). Certiorari was denied by the United States Supreme Court in this case on May 31, 1949 (69 Sup. Ct. 1156; 93 L.Ed. 1035). The District Court in *Montoya v. Tide Water Associated Oil Co.*, 79 F. Supp. 677 (S.D. N.Y.) in its decision rendered April 21, 1948, also adopted a contrary view to that of this Court.

As a third ground for rejecting the decisions of the Maritime War Emergency Board in *The Capillo* case, this Court held there was no evidence that the membership in the unions to which the Appellants belonged authorized their unions to submit the question of interpretation of their private contracts to the Maritime War Emergency Board. No such question was raised by any of the courts in *The Mason* case or *The Montoya* case, supra, and no contention has been made by the Appellants in this case that the unions to which they belong had no authority,

in behalf of the membership, to enter into the contract called the "Statement of Principles" (Nielsen's Exhibit No. 1) by which the Maritime War Emergency Board was created and empowered to act.

The decisions of the Maritime War Emergency Board regulated the payment of war bonus to merchant seamen during the entire period of the participation by the United States in World War II, and, on the basis of such decisions, literally millions of dollars were paid by the United States Government by way of war bonuses to merchant seamen employed aboard vessels engaged on voyages declared to be war zones. We believe it inconceivable that the creation and empowering of this Board by contract was an unauthorized act on the part of the signatories to the Statement of Principles, including all of the maritime labor unions to which the respective Appellants in the present case belonged.

The fourth ground relied upon by this Court in *The Capillo* case for rejecting the decisions of the Maritime War Emergency Board was based upon a construction of Decision No. 5, Revised, of the Maritime War Emergency Board (Nielsen's Exhibit No. 8) issued by the Board on February 21, 1942. This Court stated that this decision "does not purport to apply to cases of specific shipping article agreements between seamen and shipowners, much less to those prior to the agreement of December 19, 1941, when the Board was created."

Both the District Court and the United States Court of Appeals for the First Circuit in *The Mason* case, *supra*, held that war bonus provisions contained in a collective bargaining agreement dated August 1, 1941, were superseded by the subsequent decisions of the Maritime War Emergency Board. A similar result was reached in *The Montoya* case, where the decisions of the Board were incorporated by reference in the shipping articles.

We submit that an analysis of Decision No. 5, Revised, compels the conclusion that this decision superseded and supplanted shipping articles and collective bargaining agreements on Febru-

ary 21, 1942, in respect to all matters covered by the decision, including payments to be made merchant seamen during their internment.

The last paragraph on page 2 of the decision provides for the effective dates of the various articles contained in the decision. Under this paragraph, Decision No. 5, Revised, was not retroactive in the present case to December 7, 1941, in respect to the payment of basic wages and emergency wages during internment, because an agreement to make these payments existed. Thus, the decision was inoperative in the present case between December 7, 1941, and February 21, 1942, as to these features. This is inconsequential, however, because basic wages and emergency wages were paid to the Appellants. Article 6 of the decision, however, was made effective as of the date of the decision, to wit, February 21, 1942, irrespective of the existence of any agreements contained in shipping articles or collective bargaining contracts, conflicting or not. It should be borne in mind in this connection that, by the opening statement of the signatories contained in the Statement of Principles, uniformity of treatment in respect to the payment of war bonus was a primary objective. This opening paragraph reads as follows:

"In so far as areas, war bonuses and insurance are concerned, it is regarded as desirable and necessary that a uniform basis for each item covering the entire nation and the entire industry be reached."

Further light on the intent of the parties in creating and empowering the Maritime War Emergency Board is found in the following language contained in Exhibit A, attached to, and made a part of, the Statement of Principles:

"Under present war conditions, however, neither the unions nor the steamship operators will at all times be in a position to obtain adequate information with respect to the extent of war risks in order to enable them to bargain intelligently with respect to questions relating to war risk compensation and insurance of the personnel of such vessels.

"In order to afford a procedure for settling questions relating to war risk compensation and insurance which will at the same time insure that the consideration thereof shall be based upon adequate and accurate information and that such questions shall be settled in such manner as shall most certainly assist in the prosecution of the war, it is proposed that there shall be established a board to be known as the Maritime War Emergency Board (hereinafter sometimes called the Board) or by some other suitable name, and to be composed and have the powers and duties hereinafter set forth."

What the Board intended and provided in respect to making retroactive Decision No. 5, Revised, was to exempt from retroactivity those situations in which payments had already been made under contractual commitments for the same in the form of shipping articles or collective bargaining agreements. However, on the effective date of the decision, to wit, February 21, 1942, it was intended and provided that henceforth payments made to merchant seamen whose vessels were lost or captured during the war, or who were interned, should be made on a uniform basis. In order to obtain such uniformity on the effective date of the decision, the same, of course, superseded and supplanted any other contractual provision conflicting therewith.

Maritime unions which are collective bargaining representatives of the various categories of merchant seamen, like other unions, have power, and exercise that power, to amend previously existing contractual arrangements made by them in behalf of their membership. Immediately upon its creation, the Maritime War Emergency Board issued decisions raising the rates of war bonus on voyages in various danger areas throughout the world. Understandingly, with the entry of the United States in World War II, voyages of vessels into various areas became increasingly hazardous. Needless to say, the merchant seamen represented by the maritime labor unions, which, in their behalf, joined in the creation of this Board, benefited by the decisions of the Board and the protection afforded under its decisions.

If, in some instances, and by virtue of special circumstances, it developed that some merchant seamen might receive less under the decisions of the Maritime War Emergency Board than under their previous contractual arrangements, such result must be considered as a necessary contribution to the desired and necessary objective of uniformity for the collective benefit of all merchant seamen on American-flag vessels.

It is, of course, clear that Article 6 of Decision No. 5, Revised, does not provide for the recovery of war bonus during internment on land. A reading of this provision forces such conclusion, and the proposition stated has been held in both the *Mason* and *Montoya* cases, *supra*.

Accordingly, if this Court adheres to its views as expressed in its decisions—which we, of course, submit are erroneous—that the riders attached to the shipping articles and the supplementary bonus agreements provided for payment of war bonus during internment on land, such obligations under these agreements were supplanted and superseded on February 21, 1942, by Decision No. 5, Revised, which provided that, from that time on, interned seamen, including Appellants, were not entitled to war bonus during their internment on land. We believe the Appellee is entitled to a decision and determination on this issue in the present case. As we have heretofore pointed out, however, the applicability of Decision No. 5, Revised, and other decisions of the Maritime War Emergency Board is of no consequence or materiality if it is held that the riders attached to the shipping articles and the supplementary bonus agreements do not provide for the payment of war bonus during internment on land, as was the finding and ruling of the District Court in this case.

In respect to the position of the Appellee pertaining to the applicability of the decisions of the Maritime War Emergency Board during the repatriation of the Appellants, we respectfully refer the Court to the discussion of this point contained in Appellee's brief (p. 55).

IN ADDITION TO THE NECESSITY FOR CORRECTION OF THE FOREGOING ERRORS, THERE ARE MANY OTHER REASONS FOR GRANTING A REHEARING IN THE PRESENT CASE.

This Court's original opinion in the *Agnew* case, dated May 5, 1949, was amended on May 6th and again on May 18th. This Court's *per curiam* opinion in the *Griffin* and *Federer* cases on May 6, 1949, was set aside by its subsequent decision on May 19, 1949, and in the *Griffin* case, a supplemental decision was issued on May 28, 1949. These amended and changed decisions in themselves suggest doubt on the part of the Court, at least, in respect to its original conception of the issues. In its decision in the *Agnew* case of May 5, this Court confused the terms "emergency wage increase" and "emergency wages" as used in the riders, despite the stipulation that the former term meant "war bonus," and decreed the payment of war bonus during repatriation east of the 180th Meridian, which was not even claimed or contended for by the Appellants. The Court also, in this original decision, stated it was unreasonable to suppose that war bonus during the period of internment of the crew would not be provided for, because of world-wide knowledge of the rape of Nanking. *The China Handbook (1937-1943)*, compiled by the Chinese Ministry of Information (McMillan, 1943), states, at page 851, that Japanese atrocities, now commonly termed "the rape of Nanking," commenced on December 13, 1937, following the siege laid to the city on December 7th, and that such looting continued for approximately five months. If such a basis was used for the supposition that war bonus would be provided for during internment, it would be reasonable to expect that shipping articles and collective bargaining agreements dealing with this subject would have so provided commencing in the early part of 1938 even before the commencement in Europe of World War II in 1939.

Appellee introduced supplementary bonus agreements, arrived at by the collective bargaining process, entered into between its representative and all the maritime labor unions representing the

Appellants, commencing with a series of agreements consummated in the spring and summer of 1940 (Bryan's Exs. Nos. 11 to 15 inclusive). The second series was entered into on February 10, 1941 (Bryan's Exs. Nos. 17 to 21 inclusive), and the third series on May 19, 1941 (Bryan's Exs. Nos. 22 to 26 inclusive). Not only was there no provision in any of such collective bargaining agreements for the payment of war bonus during internment, but there was no provision for the payment of wages during internment or, in fact, no provision even contemplating the internment, destruction, or abandonment of vessels, and much less the internment of crews.

The United States Court of Appeals for the First Circuit in *Mason v. Texas Co.*, supra, at page 561, held with reference to a collective bargaining agreement in that case dated August 1, 1941:

"When the collective bargaining agreement was written, the United States was not at war, and its seamen were not being interned. The language of the agreement affords little basis for a conclusion that the parties contemplated that the United States would soon become a belligerent or anything more than that the company would fulfill the obligations of subparagraph 3(c) toward captured officers being repatriated in accordance with the usual treatment given seamen of neutral nations."

Other statements appearing in the amended decisions of this Court in the present case are erroneous in minor respects. For instance, reference is made in the *Agnew* decision to internment in Japan, whereas the internment of Appellants was in China (Ap. pp. 159-163). In the *Griffin* and *Federer* decision of May 19th, the Appellants in both of these cases are described as unlicensed personnel, whereas, as shown by the Court's supplemental decision in the *Griffin* case, all of the Appellants in that case were licensed personnel.

An unusual situation was presented at the time of oral argument of these consolidated cases. The Chief Judge who later participated in the decision was absent, and, upon the agree-

ment of the parties, the argument was made before only two Circuit Judges. In view of the reliance placed by this Court on oral argument, and in view of the extreme importance of this case to both the Appellants and the Appellee, a re-hearing should be granted to afford the parties an opportunity to be heard, and for their oral arguments to be considered, by all three Judges participating in the decision.

Appellants in the three consolidated cases comprise only 86 out of a total of 172 seamen and officers aboard the *S.S. President Harrison* at the time of its capture by the Japanese. The decision in these cases will be determinative of similar issues pertaining to all other crew members. The monetary amount involved, therefore, is far greater than even the very large amount now recoverable by the Appellants under this Court's decisions.

Furthermore, there are two other cases on appeal, or in the process of being appealed, to this Court which involve similar issues. The case of *Philip Nelson v. American President Lines Ltd., and United States of America* (No. 12,191) is presently before this Court on appeal. There is included in that case a claim for war bonus during the period of internment. Another group of libels by former crew members of the *S.S. Malama* against Matson Navigation Company, in which case the United States of America is impleaded as a respondent, is presently in the course of being appealed to this Court from a decision by the same District Court (N.D. Cal.) which decided the present case and which, as here, denied recovery of war bonus during internment on land (unreported, Final Decree entered March 24, 1949).

The decision of this Court in the present case may be largely, if not wholly, determinative of the issues in the other two cases mentioned. A large monetary amount is likewise involved in the *Malama* case. In the latter case, this Court will be called upon to construe riders attached to the shipping articles of the *S.S. Malama* (included in Exhibit H) containing an internment provision in the form set forth in Appendix F of Appellee's

brief. In that internment provision, the second sentence reads as follows:

“War risk bonus at the rates specified in subdivision (b) of paragraph 1 of the supplementary agreements between the parties shall be paid while employees are in the war zones defined therein.”

It will be noted that, in the *Malama* rider quoted above, express reference is made to the supplementary bonus agreements, not only for ascertainment of the amount of bonus payable, but also for definition of the war zones wherein such bonus is payable. This Court, in that case, will be called upon to determine whether the war zones defined in the supplementary bonus agreements, which are the same in that case as in the present case, are geographical areas which encompass internment on land, or whether such war zones are defined in terms of voyages, as was held by this Court in *The Capillo* case. Accordingly, in *The Malama* case, as in the present case, this Court will be called upon to either sustain its construction of the supplementary bonus agreements in *The Capillo* case, or to sustain its construction of the supplementary bonus agreements in the present case, and in view of the direct conflict between its decisions, to overrule one or the other of such decisions. Such circumstances, we believe, furnish abundant additional reasons for granting a re-hearing in the present case.

Furthermore, the Appellants themselves have petitioned for a modification or amendment of this Court's decisions.

Under all of the foregoing circumstances, the Appellee respectfully petitions this Court to reconsider its decisions in the present case and to correct the errors discussed above.

Respectfully submitted,

LILLICK, GEARY, OLSON, ADAMS
& CHARLES,
IRA S. LILLICK,
JAMES L. ADAMS,
*Proctors for Petitioner and
Appellee.*

CERTIFICATE OF COUNSEL

As counsel for American President Lines, Ltd., petitioner in the above Petition for Rehearing, I hereby certify that, in my judgment, the Petition is well-founded and that it is not interposed for delay.

JAMES L. ADAMS,

(Appendix follows)

APPENDIX A

Maritime War Emergency Board*

Decision 2D

Bonus

In view of the cessation of hostilities with Japan and the occupation of that country by United States Military forces, the Maritime War Emergency Board today announces additional adjustments in war risk bonuses, which are paid to seamen employed on vessels of the American Merchant Marine. These adjustments have been incorporated in this Decision 2D, which is effective October 1, 1945, and which supersedes all previous bonus decisions of the Board.

BASIS FOR DECISIONS OF THE BOARD.

Soon after Pearl Harbor, in order to resolve the potentially continuous disputes between the shipowners and the maritime unions over the issue of bonuses incident to war risks and changes in war risks; to eliminate the chaotic basis for the determination of bonuses in individual disputes; to provide an agency for securing confidential war risk information not accessible to the parties; to provide equitable uniformity in establishing war risk bonuses; to promote stability in the maritime industry; and to facilitate the successful prosecution of the war against the Axis powers, the Maritime War Emergency Board was established by the shipowners and the maritime unions signatory to the Statement of Principles.

In fulfillment of these responsibilities and accordingly to resolve the continuing general disputes on the basis of such confidential information with regard to war risks and changes in war risks on all the oceans, which the Maritime War Emergency Board was created to adjudge on a global basis, the Board from time to time raised the bonuses on a national industry-wide scale as risks increased with the advances of the Axis powers, and, in

*Nielsen's Ex. No. 10.

like manner, reduced the bonuses as risks decreased with the retreats and defeats of the Axis powers.

In accordance with its responsibilities under the Statement of Principles the Board has issued several bonus decisions. During the war years the distribution of war risk at sea has not been constant. In the first years of the war there was a pervading risk on all oceans. Therefore, the earlier decisions of the Board placed greater emphasis on increases in voyage bonuses. With the onset of offensive action by the Allied Nations, risks became intensified and concentrated in the active theaters of war. Therefore, the Board made provision for special area and attack bonuses, and began to decrease voyage bonuses. In so doing, the Board gave consideration to a policy of making decreases in voyage bonuses in several steps. As a part of this policy, the Board indicated in anticipation of V-E Day that a global voyage bonus floor of $33\frac{1}{3}\%$ (\$40 minimum) would be maintained as long as there were hostilities on any ocean.

Now, however, hostilities have terminated on all oceans. Consequently, over-all war hazard at sea no longer exists. Therefore, the Board has eliminated all voyage bonuses. However, the Board finds that some risk still exists, but only in specific areas and only by reason of residual hazards, such as mines. Therefore, the Board has retained the vessel attack bonus unchanged, and has continued the area bonus in a modified form as compensation for these residual hazards.

Nos. 11,943, 11,944, 11,946

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES W. AGNEW, JR., et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,943

JOHN W. GRIFFIN, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,944

**CONSOLIDATED
CASES**

AUGUST FEDERER, et al.,
Appellants,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellee.

No. 11,946

MOTION TO STAY MANDATE

*To the Honorable Judges of the United States Court of Appeals
for the Ninth Circuit:*

*American President Lines, Ltd., a corporation, Appellee in
the above-entitled consolidated causes, hereby respectfully moves
this Court, in the event that its Petition for Rehearing, filed*

concurrently herewith, be denied, for an order staying the issuance of the mandate in each of said causes for a period of ninety (90) days after denial of said Petition, in order to allow Appellee to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and, thereafter, until such time as the said Petition for Writ of Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated: July 15, 1949.

LILICK, GEARY, OLSON, ADAMS
& CHARLES,
IRA S. LILICK,
JAMES L. ADAMS,
Proctors for Appellee.

